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Bullies, Words, and Wounds: One State's Approach in Controlling Aggressive Expression between Children

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BULLIES, WORDS, AND WOUNDS: ONE STATE'S APPROACH IN CONTROLLING AGGRESSIVE EXPRESSION BETWEEN CHILDREN

INTRODUCTION

Many adults seem to perceive confrontations with the bully in the school yard as a staple ingredient of any "normal" childhood. It is such a perception, though, that creates the societal myths underestimating the damage that bullying behavior inflicts upon its participants. Studies are now showing the severe, and lifelong, consequences this behavior can have on both the victimized child and the bully.[1] Bullying comes in all forms and the "players" of this game are of all ages, shapes, and sizes. This behavior can range from verbal aggression (name-calling, teasing, and taunting) to physical confrontations (pinching, hitting, kicking) and may escalate into aggressive, physical attacks or even death. Although verbal aggression may lack an immediate physical harm, constant verbal attacks may wound the victimized child just as severely as a punch or a kick.[2]

As some states and communities begin to comprehend the devastating and long-term effects bullying has on children, new questions must be addressed concerning this age-old problem: How should society control verbal aggression? What is the most effective way to discipline the bully while helping both the victim and bully overcome the psychological barriers? What forum is best suited for the disciplinary and psychological needs of the participants? These questions, and many more addressed herein, demonstrate the complex issues implicated in a seemingly simple problem.

One state, North Dakota, recently faced a situation that incorporated these questions with a twist: What role will the courts play when

1. *See generally* RICHARD J. HAZLER, BREAKING THE CYCLES OF VIOLENCE: INTERVENTIONS FOR BULLYING AND VICTIMIZATION (1996) (discussing the future implications of bullying); DAN OLWEUS, BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO (1993) (discussing intervention techniques).

2. The scope of this Note is confined to "verbal or expressive aggression" between children. This aggression is expression in the form of name-calling, teasing, taunting, threats, and any type of written, verbal, facial, or artistic expression used to humiliate, harass, or ostracize another child. Although the author is aware that most bullying behavior involves mixed aspects of verbal and physical conduct, her analysis has been purposely restricted to expressive behavior. This limitation more vividly illustrates the tough issues implicated by *Svedberg v. Stamness*, 525 N.W.2d 678 (N.D. 1994), since the conduct at issue was purely expressive.

the parents, schools, and community have allegedly failed to control a bullying situation? The North Dakota Supreme Court decided that a legal solution was appropriate to "stop" one child from bullying another in its decision *Svedberg v. Stamness*.[3] This case arose from a situation that included years of verbal bullying where the victim and his parents were unable to receive satisfactory relief from the school and community.[4] The North Dakota Supreme Court permitted the victimized child to seek shelter from his bully under one of its anti-stalking laws.[5] Because the bullying behavior involved in this case was verbal, or expressive, behavior, much of the court's focus was on the bully's First Amendment defense to the stalking claim.[6]

Part I of this Note will address the major issues raised by *Svedberg v. Stamness*. This section will address the First Amendment and the judicially created "fighting words" doctrine, with an additional exploration of the North Dakota Supreme Court's interpretation of that doctrine prior to its decision in *Svedberg v. Stamness*.[7] In addition, stalking laws, in particular the laws in North Dakota, are discussed to provide the background behind this court's "legal solution."[8] Part I concludes with a brief look at the rights of children and an exploration of this childhood phenomenon called "bullying."[9]

Part II focuses on the North Dakota Supreme Court's decision in *Svedberg v. Stamness*, with an analysis of the majority, concurring, and dissenting opinions. Part III evaluates the issues presented by the North Dakota case, and Part IV stresses the national impact this "legal solution" may have on the broader issues implicated by this decision. This Note identifies the major issue raised by this case: Where is the best forum for remedying bullying situations? The author argues that aggressive and verbal expression between children should be seriously monitored and controlled by parents, schools, and communities with effective and constructive discipline and psychological help for both the bully and his target. Only the local-level forum can effectively stop this behavior by giving its children the skills to live and communicate in today's world. Therefore, the author concludes that the legal remedy administered by the courts cannot serve such valuable functions and should only be utilized as a last resort to administer some relief where a community has failed its children.

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3. 525 N.W.2d 678 (N.D. 1994).
4. *Id.* at 685.
5. *Id.* at 684.
6. *Id.* at 682-84.
7. *See infra* notes 10-107 and accompanying text.
8. *See infra* notes 108-23 and accompanying text.
9. *See infra* notes 124-283 and accompanying text.

I. BACKGROUND

This section explores the issues involved in the *Svedberg* case and the broader implications of the decision. Part A represents the discussion of the First Amendment fighting words doctrine. This is a key section since the majority opinion of the *Svedberg* case relies so heavily on the fighting words doctrine to prohibit the boy's speech and expression. Issues explored in this section consist of general First Amendment theories and judicial methodology, a tracing of the fighting words doctrine and a conclusion with scholarly analysis and criticism of the modern doctrine. Part B specifically looks at the North Dakota Supreme Court's interpretation of the fighting words doctrine prior to its decision in *Svedberg*. This section continues with Part C, which explores the stalking statute used to prohibit the bully's behavior. It includes a brief discussion of the statute, the legislative history, and anti-stalking legislation in general. This section concludes with an extensive look at speech and children. Part D looks into the significant legal history of the First Amendment and children, the empirical evidence of the children's development of rationality, the right and duty of the public schools to discipline children, and a close examination of bullying behavior.

A. The U.S. Supreme Court's First Amendment Fighting Words Doctrine

Freedom of speech has been described as a "cornerstone" of the United States system of democratic government.[10] The First Amendment provides a vehicle for all citizens to voice opinions, grievances, thoughts, and expression.[11] The protections afforded to citizens by the First Amendment are seen as both an extension of liberty and an acceptance of the consequences of such liberty.[12] Theories supporting

10. *See* KENT GREENAWALT, FIGHTING WORDS 3 (1995) (noting the important role freedom of expression plays in a democracy). For example, by studying the relationships between citizens, government, and its branches, Greenawalt finds that the manner in which a judiciary and a legislature govern this freedom reveals information about the relationship between them. *Id.* at 3-10.

11. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

12. *See, e.g.*, Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322 (1992) (suggesting that the cost of a strong First Amendment is a "legal toleration of speech-related harm" which is "the currency with which we as a society pay for First Amendment protection").

the First Amendment help trace the scope of free speech in modern times.[13]

Theories of free speech can be divided into separate categories, depending on the focus of analysis.[14] For example, free speech principles can be supported by utilitarian goals and nonutilitarian, or individual, purposes.[15] Some frequently cited utilitarian theories support speech which facilitates the political process,[16] seeks truth,[17] and serves as a check on abuse by public officials.[18] A classic nonutilitarian theory supports speech which contributes to the pursuit of self-fulfillment, autonomy, and individual liberty.[19] Although the var-

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13. *See generally* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 12-27 (1989) (exploring the numerous justifications for free speech and concluding that no one justification can support the First Amendment on its own).

14. Some scholars contend that there is a single justification for free speech under a First Amendment analysis. Of course, most of these scholars do not agree on what that justification is. *See, e.g.*, MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 1-86 (1984) (describing the justification as individual self-realization); *see also* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 991 (1978) (asserting key justifications for free speech as individual participation in political change and individual self-fulfillment); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25-26 (1971) (finding a political principle of free speech as most relevant to the function of speech). *But see* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989) (addressing the need to consider many justifications in order to adequately interpret the First Amendment protections).

15. *See* GREENAWALT, *supra* note 10, at 14-34 (preferring to categorize speech justifications as "consequentialist" and "nonconsequentialist"). Greenawalt describes the consequentialist's reasoning as favoring speech if it "contributes to some desirable state of affairs." *Id.* at 14. This approach looks to the end result of speech, whereas the "nonconsequentialist" line of reasoning does not look to the consequences of specific practices of speech. *Id.* Nonconsequentialist reasoning focuses on individual rights to speak, or not to speak, rather than on the results (such as whether speech contributes to the political process). *Id.* Greenawalt gives a few "notable" examples of the nonconsequentialist line of reasoning as supporting "present rights or claims of justice." *Id.*

16. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . .").

17. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes' famous "marketplace of ideas" is an often-cited rationale to protect speech: "[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market and . . . truth is the only ground upon which their wishes safely can be carried out." *Id. But see* GREENAWALT, *supra* note 10, at 34 (criticizing the "marketplace of ideas approach" as a "mistaken or incomplete argument for free speech" because it must rest on other premises not articulated in the test).

18. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, AM. B. FOUND. RES. J. 521, 542 (1977) (arguing that "the role of the ordinary citizen is not so much to contribute on a continuing basis to the formation of public policy as to retain a veto power to be employed when the decisions of officials pass certain bounds").

19. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) (stating that "freedom of expression is essential as a means of assuring individual self-fulfillment"); *see also*

ious theories are a constant source of intellectual debate and discussion, the underlying basis of each realize a distinct value in protecting speech and expression.[20]

The judicial approach, or methodology, of analyzing the scope of free speech protections is most frequently classified into three categories.[21] First, the absolutist approach takes a literal interpretation of the language in the First Amendment and prohibits any restriction on speech.[22] Second, the balancing approach weighs the government interest in prohibiting speech against the speech interest.[23] Third, the categorical approach carves out specific categories of speech and expression which do not receive First Amendment protection.[24] The theory behind this approach is the establishment of bright-line rules, which automatically exclude certain expression from First Amendment protection and which may be regulated by the state.[25] Because categorization is responsible for the fighting words exception, analysis of this approach will be further explored throughout this discussion.[26]

Although the fighting words doctrine was developed over fifty years ago, it remains a largely undefined and misunderstood doctrine of speech regulation. *Chaplinsky v. New Hampshire*[27] represents the

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REDISH, *supra* note 14, at 11 (citing self-realization as the ultimate value protected by the First Amendment).

20. *See supra* notes 12-19 and accompanying text (comparing the various asserted free speech rationales).

21. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 1004-07 (12th ed. 1991) (noting these three themes as "recurrent . . . in modern First Amendment adjudication").

22. Justice Black is the most noted advocate of the absolutist approach. *See* CHARLES L. BLACK, JR., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, *in* THE OCCASIONS OF JUSTICE 89, 100-01 (1963) (discussing Justice Black's absolutist approach and the recognition that balancing plays even in this approach). Although Justice Black strictly interpreted the language "Congress shall make no law" to strike down any laws limiting speech, his definition of what constituted speech was very narrow. *See, e.g.*, Street v. New York, 394 U.S. 576, 610 (1969) (Black, J., dissenting) (finding flag burning properly prohibited "conduct" rather than protected expression). Justice Black found flag burning to be wholly outside the purview of First Amendment protection. *Id.*

23. *See* Cohen v. California, 403 U.S. 15 (1971) (providing an example of the Court's balancing process as applied to a First Amendment analysis). The Court in *Cohen* found the speaker's heavy speech interest outweighed the state's asserted privacy interest. *Id.* at 23; *see infra* notes 61-65, 69-72 and accompanying text (discussing *Cohen* and its impact on the fighting words analysis); *see also* GUNTHER, *supra* note 21, at 1004-07 (criticizing the balancing approach as frequently interpreted too subjectively and often left to judicial discretion).

24. The current categories of speech receiving less or no First Amendment protections are defamation, fighting words, obscenity (including some varieties of "indecent" communication), and commercial speech. See GUNTHER, *supra* note 21, at 1070 for a review of these categories.

25. *See id.* at 1007 (contending that the categorization approach has elements of both the absolutist and balancing approaches).

26. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (introducing the fighting words category).

27. *Id.*

foundation of the fighting words doctrine. The defendant in *Chaplinsky*, a Jehovah's Witness, called the City Marshal a "goddamned racketeer" and "a damned Fascist" before the Marshal and a crowd on a city street.[28] The Court unanimously upheld the defendant's conviction under the state's disorderly conduct statute.[29] The Court categorized fighting words as outside the protection of the First Amendment.[30] Fighting words were defined by the Court as "those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[31] The Court went on to observe that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[32] The Court found that New Hampshire's statutory intent to maintain public peace was legitimate and that the only words prohibited were those which had a "direct tendency" to cause retaliation by the addressee.[33] The Court further defined the fighting words test as an objective measure of the reasonable response of an "average addressee" to inflammatory words.[34] This decision established not only a new, judicially created exception to the First Amendment, it started a debate over its parameters which is currently far from settled.[35]

A few years later, the Court reaffirmed the fighting words category in *Terminiello v. Chicago*[36] but narrowed the doctrine's scope of cov-

28. *Id.* at 569-70.

29. *Id.* at 569, 574. The New Hampshire law at issue stated that "'[n]o person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name.'" *Id.* at 569 (quoting 378 N.H. REV. STAT. ANN. § 2).

30. *Id.* at 571-72. The court also listed obscenity, profanity, and libel as other unprotected categories. *Id.*

31. *Id.* at 572; *see* Melody L. Hurdle, Note, R.A.V. v. City of St. Paul: *The Continuing Confusion of the Fighting Words Doctrine*, 47 VAND. L. REV. 1143, 1148-49 (1994) (discussing the two definitions of fighting words); *see also* Michael J. Mannheimer, Note, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527 (1993) (tracing the 50-year evolution of the *Chaplinsky* fighting words tests).

32. *Chaplinsky*, 315 U.S. at 572.

33. *Id.* at 573.

34. *Id.*

35. *See, e.g.*, Hurdle, *supra* note 31, at 1147-54 (highlighting the scope of the debate which continues over *Chaplinsky's* interpretation). Some scholars contend that the Court intended a narrow holding. *Id.* at 1147.

36. 337 U.S. 1, 17-22 (1949) (convicting the defendant under a breach-of-the-peace statute for calling a group of protesters "slimy scum," "snakes," and "atheistic, communistic Jew[s]" during his speech).

erage to specific situations which threatened incitement to violence.[37] This shift in emphasis required the Court to look to the context of words—not just the content.[38] Therefore, the Court concluded that the fighting words doctrine only included speech which incited an immediate retaliation and not those words which caused injury by utterance.[39]

In *Feiner v. New York*,[40] the Court upheld the defendant's disorderly conduct conviction based on his political speech during a street rally.[41] Based on its prior decision in *Terminiello*, the Court concluded that the defendant was not convicted for the "making or content of his speech" but rather for "the reaction which it actually engendered."[42] In other words, the speaker was arrested and convicted based on the audience's reaction to his speech, not for the words alone.[43]

Shortly after the *Feiner* decision, the Court relied on the fighting words doctrine in its development of other areas of unprotected speech. For example, the Court in *Beauharnais v. Illinois*[44] inter-

37. *Id.* at 5-6 (finding the state court's interpretation of its statute unconstitutionally overbroad since it included punishment for speech which "stir[s] people to anger"). By excluding language which only angered or disturbed the audience, the Court seemed to reject a per se presumption of violence from specific words. *Id.* at 6. This standard is later emphasized in the Court's decision in *Cohen v. California*. See *infra* notes 61-65 and accompanying text for a further discussion of *Cohen*.

38. 337 U.S. at 46 (stating that a conviction based on content alone may not stand); *see also* Hurdle, *supra* note 31, at 1150 (stating that "the Court considered the likelihood of an uncontrollable reaction to be a factual inquiry that relies on the circumstances surrounding the use of the language").

39. *Terminiello*, 337 U.S. at 4 (citing *Chaplinsky* for the principle that speech will be protected unless it results in a clear and present danger of serious violence).

40. 340 U.S. 315 (1951). The defendant charged in this case made derogatory remarks about President Truman, local politicians, and the American Legion during a rally. *Id.* at 317. The police arrested Feiner for refusing to discontinue his speech after several crowd members expressed anger and created the potential for violence. *Id.*

41. *Id.* at 320-21. Although the Court did not analyze this case under the fighting words doctrine, the statute involved in this case parallels the statute interpreted in *Chaplinsky*. See Aviva O. Wertheimer, Note, *The First Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence*, 63 FORDHAM L. REV. 793, 804 n.61 (1994) for a comparison of the two statutes.

42. *Feiner*, 340 U.S. at 320.

43. *But see id.* at 325-27 (Black, J., dissenting) (rejecting the idea that danger was imminent or that the defendant was arrested solely because his speech had the tendency to cause violence). In his dissenting opinion, Justice Black articulated his belief that the defendant was arrested based on his race and the content of his speech. *Id.* at 328. According to Justice Black, the police should have afforded the speaker protection from the angry listeners instead of arresting him. *Id.* at 326-27.

44. 343 U.S. 250 (1952).

preted an Illinois group libel statute under a fighting words analysis.[45] The Court upheld an Illinois law which criminally prosecuted those who published materials that portrayed a class of citizens as "lacking virtue" or otherwise defamed a group of citizens.[46] The statute referred to libel as a proscribable category of speech and the Illinois Supreme Court interpreted this category to include the words "liable to cause violence and disorder."[47] The Court held that the defendant was properly charged under the statute based on Illinois' desire to prevent further racial violence and by the fact that these libelous utterances fell outside of First Amendment protection.[48]

Not only did the Court "borrow" from the fighting words doctrine for guidance in other areas of speech, it looked to and continues to refer to other speech categories for assistance in interpreting the current fighting words doctrine. For example, the Court's symbolic expression analysis in *United States v. O'Brien*[49] has provided implications for the fighting words inquiry.[50] Symbolic expression is a combination of nonverbal conduct and expressive activity performed to communicate an idea or stance on an issue.[51] The utility of the symbolic expression construct in the fighting words analysis lies behind the Court's treatment of conduct and expression.[52]

The Court's landmark decision in *Brandenberg v. Ohio*[53] in 1969 also has relevance to the fighting words doctrine.[54] The Court interpreted the statute then at issue under the imminent lawless action doctrine which applies to conduct instead of speech.[55] *Brandenberg* still remains relevant to the fighting words doctrine because both types of

45. At the time of this decision, libel of an individual was independently proscribable; so, the Court concluded that libel of a group was also prohibited. *Id.* at 254-56. Because these words were outside the coverage of the First Amendment, the Court did not go on to consider whether the words at issue would result in a clear and present danger (a requisite element under a fighting words analysis).

46. *Id.* at 251.

47. *Id.* at 254.

48. *Id.* at 256-61.

49. 391 U.S. 367 (1968) (upholding the defendant's conviction under a 1965 statute prohibiting destruction of a draft card).

50. *See* Wertheimer, *supra* note 41, at 807 n.78 (expressing the relevance of *O'Brien* to fighting words cases as "a useful test for determining when conduct combined with speech may nevertheless be punishable despite the incidental infringement on the right of free speech").

51. GUNTHER, *supra* note 21, at 1217-18.

52. *See* Wertheimer, *supra* note 41, at 837 (asserting that the Court has essentially been applying elements of the *O'Brien* test in its fighting words approach since the "birth" of the doctrine in *Chaplinsky*).

53. 395 U.S. 444 (1969).

54. *See id.* (reversing the conviction of a Ku Klux Klan member for advocating violence at a rally).

55. *Id.* at 447-49.

cases involve speech which tends to rouse listeners to anger or unrest.[56]

The Court continued to define the fighting words doctrine in *Street v. New York*.[57] In that case, the Court reversed the defendant's malicious misdemeanor conviction for publicly defacing an American flag and expressing his political beliefs.[58] The Court could not determine whether the defendant was convicted for his words or his conduct.[59] Because the Court found that the defendant's words were not spoken to incite a violent response by any specific individual, it reversed his conviction.[60]

Cohen v. California[61] also represents an important Supreme Court decision in First Amendment jurisprudence and in the development of the fighting words doctrine. In this case, the Court reversed the defendant's disorderly conduct conviction for walking around a California courthouse with "Fuck the Draft" written on the back of his coat.[62] The procedural history of *Cohen* revealed that the California Court of Appeals appeared to rely on *Chaplinsky*'s "very utterance causes injury" test to convict the defendant, although it purported to convict on a "reaction to violence" theory.[63] The Supreme Court, however, did not reach the California court's interpretation since it found that *Chaplinsky* did not apply to messages, like the defendant's, which were not directed to a specific individual or an "actual addressee."[64] The majority found that the defendant's words constituted a political statement and more specifically that the "emotive function"

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56. *See* Mannheimer, *supra* note 31, at 1549-57 (discussing the similarities between the fighting words doctrine and the clear and present danger test articulated in *Brandenberg*); *see also* Wertheimer, *supra* note 41, at 808 n.89 (finding the only difference between the two doctrines to consist of the "make-up of the audience to whom the speaker is addressing his or her remarks"). Thus, the audience in a fighting words case is hostile to the speaker while the audience in a case like *Brandenberg* is considered friendly, or supportive of the speaker. Wertheimer, *supra* note 41, at 808.

57. 394 U.S. 576 (1969).

58. *Id.* at 578-79. The defendant burned an American flag and stated, "[w]e don't need no damn flag," in reaction to the shooting of a civil rights leader. *Id.*

59. *Id.* at 588-90.

60. *Id.* at 592, 594; *see also* Texas v. Johnson, 491 U.S. 397, 409 (1989) (determining that burning an American flag did not amount to fighting words because the expression did not insult a specific individual or invite a violent reaction).

61. 403 U.S. 15 (1971).

62. *Id.*

63. *Id.* at 17. California further argued that the offensive word the defendant displayed should be excised from public discourse. The Supreme Court rejected this argument, refusing to label specific words as per se unprotected. *Id.* at 25-26.

64. *Id.* at 20 (finding that "[n]o individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult").

of the defendant's words may have been the more important element of the message.[65]

In the term following *Cohen*, the Court used its "actual addressee" standard and further narrowed the "reaction to violence" test (also known as the incitement-to-violence test) in *Gooding v. Wilson*.[66] The defendant was charged under a Georgia statute for threatening several police officers and using vulgar language during an anti-war protest.[67] The Court reversed the defendant's conviction based on the statute's overbroad nature and the unlikelihood that a specific officer would react violently.[68]

First Amendment scholar Kent Greenawalt has noted that *Cohen* and *Gooding* represent two major developments since *Chaplinsky*.[69] Professor Greenawalt stresses that *Cohen* represents the protection for emotive function of words and that since the *Cohen* decision, "not all remarks that amount to fighting words could be simply dismissed as lacking any expressive value."[70] *Gooding*, according to Professor Greenawalt, is one of a series of cases which has the importance of reaffirming *Cohen* by striking down statutes aimed at offensive speech.[71] Professor Greenawalt adds that in these cases "[t]he Court emphasized the lack of danger of immediate violence."[72]

The most recent Supreme Court decision interpreting the fighting words doctrine was the 1992 decision of *R.A.V. v. City of St. Paul*[73] in which a teen defendant was charged with disorderly conduct under St. Paul's Bias Motivated Crime Ordinance[74] for allegedly burning a cross on the lawn of an African-American family. The Court unanimously

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65. *Id.* at 26. The dissenting justices, on the other hand, would have categorized the defendant's expression as fighting words not deserving of protection. *Id.* at 27-28. Justice Blackmun described Cohen's conduct as an "absurd . . . antic," falling outside the coverage of the First Amendment. *Id.* at 27.

66. 405 U.S. 518 (1972).

67. *Id.* at 519-20 n.1. The Georgia statute prosecuted "[a]ny person who shall, without provocation, use . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . ." *Id.* at 519. However, the Court found that "opprobrious" and "abusive" words were not considered fighting words. *Id.* at 524-25. This interpretation seems to be a further rejection of *Chaplinsky*'s "injury by utterance" prong.

68. *Id.* at 528; *see* Hurdle, *supra* note 31, at 1153 (interpreting the court's language in *Gooding* as further narrowing the standard "by requiring proof that the specific individual addressed would be likely to react in an immediate, violent manner"); *see also Gooding*, 405 U.S. at 537 (Blackmun, J., dissenting) (asserting that the majority was only "paying lip service to *Chaplinsky*").

69. GREENAWALT, *supra* note 10, at 51.

70. *Id.*

71. *Id.*

72. *Id.*

73. 505 U.S. 377 (1992).

74. ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990). Section 292.02 provides:

agreed that the ordinance on its face violated the First Amendment but was split on the proper rationale.[75] The majority, headed by Justice Scalia, accepted the Minnesota Supreme Court's interpretation of the ordinance to only apply to fighting words which, by definition, could be subject to punishment.[76] Although the majority assumed the continued vitality of the fighting words doctrine under *Chaplinsky*, it held that even fighting words may not be regulated in a content-based manner.[77] The majority applied a strict scrutiny test despite the arguable "low value" of this type of expression.[78] The majority concluded that the only solution to "save" this type of ordinance would be a

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> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id.

In its interpretation of this ordinance, the Minnesota Supreme Court narrowed the ordinance to "fighting words" to avoid an overbroad interpretation of the statute's language, particularly the phrase, "arouses anger, alarm or resentment in others." *R.A.V.*, 505 U.S. at 391. Even though the state supreme court attempted to narrow the focus, the Supreme Court still found it unconstitutional. *Id.*

75. *R.A.V.*, 505 U.S. at 391; *see* Akhil Reed Amar, Comment, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992) (reviewing the case facts and the various positions); *see also* Hurdle, *supra* note 31, at 1146 ("The Supreme Court unanimously ruled the ordinance unconstitutional, yet the majority and concurring Justices' opinions contrast dramatically and contain inconsistent, infeasible approaches to the fighting words exception.").

76. *R.A.V.*, 505 U.S. at 381.

77. *Id.* at 383-91. The rule of the majority, and of current First Amendment case law and doctrine, presumes the invalidity of content-based restrictions. *Id.* at 382. In its opinion, the majority highlighted two exceptions to the content-based rule: the criminalization of threats against the President and regulations which have secondary effects on speech. *Id.* at 388-89. The Court has applied the secondary-effect exception to obscenity cases. *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50, 73 (1976) (Powell, J., concurring); *see also* Hurdle, *supra* note 31, at 1158 (analyzing the *R.A.V.* Court's assessment of the protected elements of fighting words). "According to the majority [in *R.A.V.*], fighting words are void of constitutional protection because the mode of the expression—the 'nonspeech' element of communication—is unprotected, yet the content of fighting words is safeguarded under the First Amendment." Hurdle, *supra* note 31, at 1158.

78. *R.A.V.*, 505 U.S. at 395-96. The majority's application of the strict scrutiny test to this "hate speech" is significant because it is also the test invoked for the most protected forms of expression—for example, political expression. The Court will normally accord deference to the laws of states or other branches of the federal government as long as such legislation does not violate constitutional principles or, as in the case of state laws, conflict with federal laws. DAVID MOSHMAN, CHILDREN, EDUCATION, AND THE FIRST AMENDMENT: A PSYCHOLEGAL ANALYSIS 9 (1989). "When it appears that the government has acted in violation of the Constitution," this judicial deference to the states or other branches of government "is replaced by strict scrutiny of the government's motives and the consequences of its actions." *Id.*

regulation of all fighting words instead of prohibiting only "unfavorable" fighting words.[79]

The majority went beyond its content-distinction analysis to further conclude that the practical effects of this type of statute also resulted in viewpoint discrimination.[80] Justice Scalia suggested that by restricting only certain fighting words, some speakers would be restrained by law from certain expression while an opponent may be able to engage in whatever expression she likes.[81]

While the majority struck down the St. Paul ordinance based on the city's underinclusive error, the concurrence found the unconstitutionality of the ordinance rooted in the overbroad danger of prohibiting protected words.[82] The concurring opinion, written by Justice White, addressed the concern that the ordinance reached beyond fighting words to include words that caused hurt feelings, offense, or resentment.[83] Justice White criticized the majority's adherence to the strict scrutiny standard when the content distinctions involved such low-value speech.[84]

Since the Court's decision in *R.A.V.*, there has been an outpouring of scholarly commentary, debate, and criticism of the Court's positions and the current fighting words doctrine.[85] In fact, even before the *R.A.V.* decision, there were several scholars who maintained that the fighting words doctrine was essentially dead.[86] The continued vitality of the fighting words doctrine has not been without criticism of its various elements. For example, many criticize the doctrine's focus

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79. *R.A.V.*, 505 U.S. at 386 ("[G]overnment may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed.").

80. *Id.* at 391.

81. *Id.* at 391-92 (contending that a city has no "authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry Rules").

82. *Id.* at 411. Even though the Minnesota Supreme Court narrowed the statute to fighting words, the concurrence believed that Minnesota still did not correct the overbreadth problem. Justice White asserted that the ordinance was still silent on which "injuries" would sustain a conviction. *Id.* at 413 (White, J., concurring).

83. *Id.*

84. *Id.* at 403.

85. *See* GREENAWALT, *supra* note 10, at 55 (commenting that the *R.A.V.* decision "reveals much about the present state of First Amendment adjudication in the [U.S.]"). Greenawalt goes on to emphasize that the Court's position on content discrimination plays a major role in most speech cases. *Id.* at 60-61.

86. *See* Gooding v. Wilson, 405 U.S. 518, 537 (1972) (Blackmun, J., dissenting) (asserting that the majority's decision merely paid "lip service" to *Chaplinsky* and the doctrine it represented); Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 536 (1980) (asserting that a fighting words doctrine has no place in a democratic society); Thomas F. Shea, *"Don't Bother To Smile When You Call Me That"—Fighting Words and the First Amendment*, 63 KY. L.J. 1, 1-2 (1975) (arguing that fighting words should be a protected form of speech).

on the likelihood of violent reaction by the addressee.[87] Some have recommended that the test focus on the response of all the listeners instead of exclusively on the individual addressee.[88] Another criticism of the doctrine involves the risk of government power to censor unpopular expression.[89] The doctrine also has immense implications on hate speech codes on college campuses and other educational arenas.[90] In fact, Professor Greenawalt predicts that the impact of *R.A.V.* will preclude the future possibility of any expansive law regulating hate speech.[91] The variety of discussions on the impact of *R.A.V.* and the future of the fighting words doctrine provide helpful guidance as to the appropriate regulation of speech and insults.[92]

B. North Dakota's Fighting Words Doctrine

One year before the *R.A.V.* decision was handed down, the North Dakota Supreme Court issued an opinion with its interpretation of the fighting words doctrine. The defendant in *City of Bismarck v. Schoppert*[93] challenged his conviction under the city's disorderly conduct or-

87. *See, e.g.*, Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 297 (1990) (asserting that the likelihood of a violent reaction should not be relevant in determining whether words are fighting words); Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 453-55 (noting that the victims of hate-speech are more likely to suppress or disguise their rage than fight back).

88. *See, e.g.*, GREENAWALT, *supra* note 10, at 53 (recommending that the fighting words test "should be whether remarks of that sort in that context would cause many listeners to respond forcibly").

89. *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 474 (1985) (asserting a fear of mechanistic values imposed by officials).

90. *See* Richard D. Bernstein, Note, *First Amendment Limits on Tort Liability for Words Intended To Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749, 1757 (1985) (asserting that the Court's increasing tolerance for profanity and insults have changed its perspective of the First Amendment); *see also* Wisconsin v. Mitchell, 508 U.S. 476 (1993) (upholding Wisconsin's penalty enhancement statute for bias motivated crimes); GREENAWALT, *supra* note 10, at 71-98 (addressing campus and workplace speech); Lawrence, *supra* note 87 (discussing speech codes on college campuses).

91. GREENAWALT, *supra* note 10, at 47-70. Professor Greenawalt discusses insults and epithets and the harms created by such expression. He outlines four of the more common justifications for prohibiting insults and epithets: "(1) the danger of immediate violence; (2) psychological hurt for persons who are the object of abuse; (3) general offense that such language is used; and (4) destructive long-term effects from attitudes reinforced by abusive remarks." *Id.* at 50. Professor Greenawalt asserts that there is very limited expressive value in speech that is intended to wound the addressee and embarrass him or her in a humiliating way. *Id.* at 53. He concludes that the majority's approach in *R.A.V.* was too harsh. *Id.* at 55-58.

92. See *supra* notes 85-91 and accompanying text for the scholarly debate and positions.

93. 469 N.W.2d 808 (N.D. 1991). In this case, the defendant approached a parked police car in which a female police officer and a volunteer police chaplain were sitting. *Id.* at 809. As the defendant walked by, he gave the police officer "the finger" and said, "Fucking, bitching cop." *Id.* He kept walking while the police officer attempted to talk to him through the car window. *Id.* He said, "Fuck you," three more times in response to the officer's questions. *Id.* The police

dinance.[94] The North Dakota Supreme Court reversed the defendant's conviction because his words were protected and, therefore, not proscribable based on the fighting words exception.[95] The court reviewed the challenged "inflicts injury by utterance" test and the U.S. Supreme Court's interpretation of this focus.[96] It noted that although the challenged language of the statute was from the original *Chaplinsky* test, the U.S. Supreme Court "has never given [that language] independent substance or a life of its own and has never . . . held [it] to be, by itself, a valid basis for a criminal conviction."[97] It further interpreted *Chaplinsky* to mean "that a state may limit speech in order to prevent breaches of the peace but only that speech that is 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'"[98]

The North Dakota Supreme Court continued its analysis by reviewing the *Terminiello* and *Gooding* decisions.[99] It concluded that these two decisions stood for the proposition that a state may not criminalize words simply because they are vulgar and offensive.[100] The court went on to define fighting words with language from the *Cohen* decision.[101] The court concluded its review with a discussion of *City of*

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officer got out of the car and attempted to confront him. *Id.* As she was joined by her supervisor, the defendant used more profanity. *Id.* As a result of these exchanges, he was arrested. *Id.*

94. The court cited Bismarck, N.D. Ordinance 6-05-01. This ordinance provides:

> Disorderly Conduct. A person is guilty of an offense if, with intent to harass, annoy, or alarm another person or in reckless disregard of the fact that another person is harassed, annoyed, or alarmed by his behavior, that person:
>
> . . .
>
> 3. In a public place, uses abusive or obscene language, or makes an obscene gesture, which language or gesture by its very utterance or gesture inflicts injury or tends to incite an immediate breach of the peace . . . .

Id.

95. *Id.* at 813. The court accepted the defendant's contention that the jury convicted him based on *Chaplinsky*'s injury-by-utterance test instead of whether his words tended to incite an immediate breach of peace. *Id.* at 810, 812. The court found that only the incitement to violence standard met the constitutional requirements. *Id.* at 812. The defendant's conviction failed since his "words were not a clear invitation to fight and the testimony did not demonstrate that these words, spoken to this audience, had any tendency to cause an immediate breach of the peace." *Id.* at 813.

96. *Id.* at 810-13. The court noted that the U.S. Supreme Court "edited the phrase 'inflict[s] injury' from the Chaplinsky test." *Id.* at 811.

97. *Id.* at 810.

98. *Id.* at 811 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942)).

99. See *supra* notes 36-39 and 66-68 and accompanying text for a discussion of the *Terminello* and the *Gooding* decisions.

100. *Schoppert*, 469 N.W.2d at 811.

101. *Id.* at 811-12 ("[F]ighting words are 'personally abusive epithets which, when addressed to the ordinary citizen, are as a matter of common knowledge, inherently likely to provoke violent reaction.'" (quoting Cohen v. California, 403 U.S. 15, 20 (1971)).

Houston v. Hill[102] and *Lewis v. City of New Orleans*[103] for their relevance to the police-citizen encounter at issue. Both cases stand for the proposition that police may not arrest someone for vulgar or offensive speech unless there is a clear and immediate danger of a violent response.[104] Although there is no police exception to fighting words, the court noted that the circumstances in which the words are spoken determine whether particular words are "fighting words."[105] The court concluded based on the police officers' testimony and the facts of the encounter that the defendant's words "were not a clear invitation to fight."[106] Therefore, based on the review of U.S. Supreme Court law, the North Dakota Supreme Court reversed the defendant's conviction.[107]

C. *North Dakota's Stalking Laws*

The North Dakota anti-stalking law criminalizes patterns of conduct directed from one individual to a specific victim which "frightens, intimidates, or harasses that person."[108] North Dakota also has a Disorderly Conduct Restraining Order statute,[109] which gives broader coverage for stalking protection. It prohibits conduct and speech which are intended by the speaker to put the listener in fear or anxiety for his or her safety, security, or privacy.[110] The statute explicitly states that constitutionally protected activity is not covered under this

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102. 482 U.S. 451 (1987).

103. 415 U.S. 130 (1974).

104. *Schoppert*, 469 N.W.2d at 811-12.

105. *Id.* at 813. The court noted that the officers' testimony revealed that the defendant's words were not likely to incite them to violence. The court found this testimony supported the notion that police may be thicker skinned since these officers "were able to hear Schoppert's vulgar and abusive speech as part of their duties, divorce themselves from any anger . . . and concentrate on whether there was any danger that Schoppert might act violently." *Id.*

106. *Id.*

107. *Id.*

108. N.D. CENT. CODE § 12.1-17-07.1 (Supp. 1995). "No person may intentionally stalk another person." *Id.* The North Dakota Legislature defines stalking:

> "Stalk" means to engage in an intentional course of conduct directed at a specific person which frightens, intimidates, or harasses that person, and that serves no legitimate purpose. The course of conduct may be directed toward that person or a member of that person's immediate family and must cause a reasonable person to experience fear, intimidation, or harassment.

Id. § 12.1-17-07.1(1)(c); *see* Tracy V. Kolb, Note, *North Dakota's Stalking Law: Criminalizing the Crime Before the Crime*, 70 N.D. L. REV. 159 (reviewing North Dakota's stalking law as originally enacted in 1993).

109. N.D. CENT. CODE § 12.1-31.2-01; *see infra* note 296 (providing the complete text of statute).

110. N.D. CENT. CODE § 12.1-31.2-01.

provision.[111] The penalty for violating the provisions of the restraining order can be up to a year of imprisonment, a fine of up to one thousand dollars, or both.[112]

Minutes from the legislative discussion surrounding the enactment of the Disorderly Conduct Restraining Order statute note that some members wanted to provide stalking victims with another vehicle to stop their stalkers.[113] There was a perceived need for this type of restraining order for women who could not use North Dakota's anti-stalking law because there was no imminent threat of physical harm.[114] This statute also provides stalking victims more easily attainable protection from her stalker because it allows her to seek a civil restraining order instead of waiting for enough evidence to satisfy the requirements under the anti-stalking statute for a criminal prosecution.[115]

In order to comprehend the North Dakota stalking laws at issue and the types of speech that it may prohibit, it is useful to briefly review stalking legislation and what constitutes stalking behavior. California enacted the first stalking law in 1990 in response to the murder of actress Rebecca Shaeffer and the murders of five other Orange

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111. *Id.* § 12.1-31.2-01(5)(d). This provision offers the accused a defense to strike down the restraining order issued against him.

112. *Id.* § 12.1-31.2-01(7)(b).

113. *See* N.D. Senate Jud. Comm. Minutes, H.B. 1238 (March 8, 1993) [hereinafter Minutes]. The testimony of Bonnie Palacek and James Vukelic reveal that the legislature considered the importance of a civil restraining order as a quicker way for victims of stalking to stop their harassers than through the stalking law.

114. *See* Minutes, *supra* note 113. Testimony of Ms. Bonnie Palacek explained the need for another restraint besides North Dakota's stalking law:

> Currently, only those with a history of physical abuse and who are in 'imminent threat of physical harm' may petition the court for a Protection Order [N.D. CENT. CODE § 14-07.1-02]. Although, in some parts of the state, this language has been stretched to cover victims who don't have such a history, in other parts of the state they have no protection at all.
>
> For example, in the Fargo area, victims from Minnesota who are clients of the Rape and Abuse Crisis Center have access to such Orders, but clients who live on the North Dakota side of the river don't.

Id.

115. *See* Svedberg v. Stamness, 525 N.W.2d 678, 686 (N.D. 1994) (Levine, J., dissenting). The dissent in *Svedberg* turned to the legislative history behind the Disorderly Conduct Restraining Order statute to interpret the intended protections of this law. The dissent compared this statute's benefits for stalking victims in North Dakota to the protection under the stalking law alone:

> The hope was that the option of a civil restraining order would obviate the need for victims of stalking to rely on state's attorneys to initiate criminal prosecutions with the requirement of proof beyond a reasonable doubt. . . . A civil restraining order would be quicker, simpler, and accomplish the goal of protection from the intimidation and fear caused by the stalker.

Id. (citations omitted).

County women by their respective companions.[116] Early stalking laws were very narrow and required that a stalker make a "credible threat" with an intention to put his victim in reasonable fear for her life.[117] Legislatures across the country became aware of similar problems in their own states and, soon thereafter, the flood of anti-stalking legislation began.[118] Most states, including California and North Dakota, have either broadened or implemented definitions of stalking behavior to include situations where there is no direct threat of physical violence.[119]

The tension between stalking behavior and the First Amendment provides an interesting departure from any historical doctrine. Before the First Amendment is implicated, the conduct must be expressive.[120] Most courts realize that stalking activity can be expressive.[121] In order to provide protection for stalking victims, the courts must find a basis to constitutionally prohibit the stalker's expressive behavior. Some of the asserted rationales for prohibiting such expressive conduct include likening the expression to fighting words or carving out a category of unprotected speech, such as threats of harm.[122] Whatever the rationale, both the states and the courts have begun to accept stalking stat-

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116. *See* CAL. PENAL CODE § 646.9 (West Supp. 1997) (setting forth California's stalking law); *see also* Amy M. Sneirson, Note, *No Place To Hide: Why State and Federal Enforcement of Stalking Laws May Be the Best Way To Protect Abortion Providers*, 73 WASH. U. L.Q. 635, 652 (1995) (providing more background history suggesting why California was the first state to enact a stalking statute).

117. *See* J. William David, Comment, *Is Pennsylvania's Stalking Law Constitutional?*, 56 U. PITT. L. REV. 205, 208 (1994) (noting that narrowness of these early laws put the victim at risk because "they excluded much of the peculiar behavior that constitutes stalking, like leaving ominous notes, or lying in wait near homes and offices").

118. Forty-seven states have enacted stalking laws. The states that have not (Arizona, Maine, and New York) have amended their harassment statutes to target stalking activity. *See* Sneirson, *supra* note 116, at 653.

119. *Id.* at 652; *see also* David, *supra* note 117, at 208-09 (describing stalking behavior). David explains that such behavior comes in a variety of forms so many states have amended their anti-stalking laws to cover more activity. The author also cites that seventy to eighty percent of stalking victims know their stalker. David, *supra* note 117, at 207-08.

120. *See* Spence v. Washington, 418 U.S. 405, 410-11 (1974) (defining expressive conduct as conduct that occurs when the speaker intends to convey a specific message and the addressee will understand the message based on the surrounding circumstances); *see also* David, *supra* note 117, at 213 (discussing stalking behavior and expressive conduct).

121. *See, e.g.*, Long v. Texas, 931 S.W.2d 285 (Tex. Crim. App. 1996) (finding its state's stalking statute void for vagueness due in part to the statute's threat to constitutionally protected expression that may be a part of stalking conduct).

122. See GREENAWALT, *supra* note 13, at 92-104 for an exploration of what types of threats, not necessarily specific to the stalking situation, can be criminalized. Professor Greenawalt distinguishes between pure, unconditional threats and conditional threats. *Id.* at 90-92.

utes as essential legislation by limiting First Amendment implications.[123]

D. *Speech and Children: Background of the Law in the Classroom, Children's Rights, and Bullying Behavior*

Should the First Amendment apply to children as it does to adults? Many commentators respond positively that, yes, children, like adults, should be protected by the First Amendment.[124] In fact, the U.S. Supreme Court declared that public school students were "constitutional persons" in its landmark 1969 ruling in *Tinker v. Des Moines Independent Community School District*.[125] Children's constitutional status in the First Amendment arena implicates many issues.

1. *Significant Legal History Regarding the First Amendment and Children*

Before focusing on the scope of children's First Amendment protections within the educational arena, it is important to step outside the school environment and briefly examine the general constitutional rights afforded to children.[126] In general, the U.S. Supreme Court has determined that children receive less constitutional protection than adults.[127] The Court's interpretation of children's rights presents a tension between its paternalistic efforts to safeguard children and the

123. See *supra* note 118 as evidence of the nationwide acceptance of stalking legislation.

124. *See, e.g.*, ROBERT W. LANE, BEYOND THE SCHOOLHOUSE GATE, FREE SPEECH AND THE INCULCATION OF VALUES (1995); DAVID MOSHMAN, CHILDREN, EDUCATION, AND THE FIRST AMENDMENT: A PSYCHOLEGAL ANALYSIS (1989) (representing a supportive approach for children's speech rights).

125. 393 U.S. 503 (1969).

126. *See* LANE, *supra* note 124, at 35 (exploring the general limits on children's constitutional rights outside the education context to "illuminate the Court's rationale . . . of First Amendment protection for public school students").

127. Prince v. Massachusetts, 321 U.S. 158 (1944) (establishing a standard providing less constitutional protection for children). This case involved a state statute which prohibited children under certain ages from selling newspapers and magazines in public places. *Id.* at 160-61. The Court upheld this statute by finding the substantial state interest in protecting children was stronger than the interest of the custodial figure (an aunt) who brought the suit. *Id.* at 166. The Court concluded that because the government serves as a parental figure to safeguard children, it may regulate children more than it can control the activities of adults. *Id.* at 168; *see* LANE, *supra* note 124, at 36 (providing an overview of *Prince*). Lane noted that the *Prince* test required the Court to "balance the individual rights involved against the state's authority to impose necessary and reasonable restrictions in order to achieve some legitimate purpose." LANE, *supra* note 124, at 36-37; *see also* Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 781 (1995) (citing *Prince* as an example of the Supreme Court's position that "children, simply by virtue of being children, are susceptible to dangers which adults do not risk and may therefore deserve special solicitude from the law").

liberty interest to guarantee individual interests and self-fulfillment.[128] Because of this tension, the Court attempts to strike a balance between providing no constitutional rights to children and providing "coextensive" rights of both children and adults.[129] One commentator has noted that most of the Court's decisions concerning children's constitutional rights have resulted in "modified constitutional rights" for children.[130]

The scope of children's First Amendment rights in the educational arena has been debated and litigated frequently since the *Tinker* decision. The law and education have become strange partners. On the one hand, the law has provided students with recognized rights.[131] On the other hand, the Court has recognized the school system's right to exercise certain control over students.[132] A brief exploration of the law and education since *Tinker* provides a framework of rights as guaranteed to public school children.[133]

The decision rendered in *Tinker* has been described as the "new era in the protection of students' political expression in public schools,"[134] as "the leading authority on student rights of expression in public schools,"[135] and as the acknowledgment of "the right of a child to

128. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) for an example of the Court's rejection of a state's paternalistic efforts to guide the upbringing of children. The Court struck down Oregon's statute requiring children to attend public schools (as opposed to private or parochial school). *Id.* at 534-35. The Court held that the state could not force children to a public education: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535. See LANE, *supra* note 124, at 35-42 for his analysis of the tension between what he terms "protection" and "autonomy." Lane explores this tension by looking at children's rights in such areas as sexuality and due process. He notes that in sexuality decisions involving minors, the Court prefers to limit children's autonomy and extend states' protection. Lane observed a split in the due process cases with regards to child proxies in juvenile court proceedings, but noted a stronger preference for more state protection. Lane concluded "we do not find a comprehensive, consistent theory or pattern in the Court's decisions, although there seems to be more weight assigned to protection than to autonomy." *Id.* at 42.

129. LANE, *supra* note 124, at 35-36 (discussing the lower constitutional threshold for limiting children's activities).

130. *Id.* at 44.

131. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 (1969) (recognizing children's rights to expression as long as such expression does not result in a disturbance).

132. See *infra* notes 134-47 and accompanying text for a discussion on school officials' ability to control some student expression.

133. Since the *Svedberg* case does not involve speech regulation by the school, but rather by the North Dakota Supreme Court, the following law and education analysis is limited. The inclusion of such materials becomes relevant in the analysis and will be examined further at that point. For an overview of law and public schools, see LANE, *supra* note 124.

134. MARTHA M. MCCARTHY & NELDA H. CAMBRON-MCCABE, PUBLIC SCHOOL LAW 113 (2d ed. 1987).

135. WILLIAM VALENTE, LAW IN THE SCHOOLS 314 (2d ed. 1987).

make claims to those rights and privileges heretofore denied him on the basis of his status as a minor."[136] *Tinker* involved a dispute between school authorities and students over the students' rights to wear black arm bands to class as a form of protest to the Vietnam war.[137] The Court ruled that the school did not have a secure basis for punishing the students' political and symbolic expression.[138] The *Tinker* test focused on whether the student expression "would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"[139] If such expression does not interfere, then the school's prohibition of the student's speech is not justified.[140]

Building on the *Tinker* disruption standard, the Court recognized other justifications for prohibiting certain student expression. In a 1986 decision, the Court allowed high school officials to "disassociate" the school from a student's sexually explicit speech to the student body at a school assembly by suspending him.[141] The majority in *Bethel School District No. 403 v. Fraser* held that *Tinker* did not protect disruptive expression or offensive speech and that the student's expression was both.[142] In rendering its decision, the Court noted the important value of the school officials' action against the student to show the school's disapproval of the subject matter.[143]

The Court extended the new justification from *Fraser* and modified the *Tinker* disruption test in its 1988 decision in *Hazelwood School District v. Kuhlmeier*.[144] A narrow margin of the Court found a high school principal did not violate the First Amendment rights of journalism students when he censored two of their student newspaper articles

136. Peter J. Sartorius, *Social-Psychological Concepts and the Rights of Children*, *in* SCHOOLING AND THE RIGHTS OF CHILDREN 64, 67 (Vernon F. Haubrich & Michael W. Apple eds., 1975).

137. 393 U.S. 503, 504 (1969) (resulting in the suspension of three students for wearing the armbands).

138. *Id.* at 509-11 (finding that school authority did not prohibit the wearing of all symbols; it only targeted the particular expression the three students were projecting).

139. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (1966)). *But see* LANE, *supra* note 124, at 113 (noting that the current test considers more than the *Tinker* disruption standard).

140. *Tinker*, 393 U.S. at 508 (finding that the "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression").

141. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (concerning a high school student who gave a nominating speech at a school assembly that focused on a sexual metaphor).

142. *Id.* at 680.

143. *Id.* at 685-87 (stating that "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education").

144. 484 U.S. 260 (1988).

for publication.[145] The Court granted school officials the right to disassociate the school from student expression which may be inconsistent with societal values, even if it means refusing to sponsor certain expression.[146] The articulated test allows school authorities to exercise control over such student expression as found in a school newspaper if the school's "actions are reasonably related to legitimate pedagogical concerns."[147]

The First Amendment standard as applied to public school students includes an analysis of the content of the student's speech and its disruptive effect in order to determine consistency with educational values. Based on these standards, the Court has carved out other categories of expression from First Amendment protection for student speech—modeled after the First Amendment doctrine as applied to adults.[148] For example, the Court will not protect student expression considered to be defamatory,[149] obscene or vulgar,[150] or inflammatory.[151] These categories are more easily invoked in the public school setting than for adults since the school authorities have a lower constitutional threshold to satisfy than a state attempting to curb adult expression.

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145. *Id.* at 274 (justifying the principal's censorship of an article on teen pregnancy and another article on the impact of divorce on students). The dissent, on the other hand, characterized the principal's actions as that of "thought police." *Id.* at 285 (Brennan, J., dissenting).

146. *Id.* at 271-73 (noting that a school need not provide its resources to promote student expression which school officials want to disassociate from school endorsement).

147. *Id.* at 273; *see also* MOSHMAN, *supra* note 124, at 27 (discussing the contradictory approaches of *Tinker* and *Hazelwood*).

148. See MCCARTHY & CAMBRON-MCCABE, *supra* note 134, at 110 for a discussion of unprotected student conduct and expression.

149. *Id.* at 110-11. For example, the Court looks to the status of the plaintiff, the context of the statement, and the asserted expression to determine whether it was fact or opinion. *Id.* at 111.

150. *Id.* at 111-12 (noting the Supreme Court's approval of a sliding scale definition of obscenity as applied to minors); *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (permitting a school to punish a student for a sexually explicit speech delivered at a school assembly); Miller v. California, 413 U.S. 15 (1973) (setting forth the obscenity standard used to evaluate materials intended for adults); Ginsberg v. New York, 390 U.S. 629, 636-337 (1968) (upholding a state law prohibiting the sale of magazines containing nudity to children).

151. *See* MCCARTHY & CAMBRON-MCCABE, *supra* note 134, at 112 (equating inflammatory expression to "fighting words"); *see also* Melton v. Young, 465 F.2d 1332 (6th Cir. 1972) (illustrating one court's approach to fighting words in the school environment); LANE, *supra* note 124, at 113 (explaining an important limitation of the *Tinker* disruption standard as applied to inflammatory expression). Lane notes that "fighting words" may not result in apparent disruption in the classroom since such behavior is often not observable to those in charge. "Fear, anger, resentment, revulsion, or embarrassment may explain the veneer of passive acquiescence, making student speech disruptive in ways not easily observable." LANE, *supra* note 124, at 113.

2. *Empirical Evidence on an Individual's Development of Rationality*

Although the Court has recognized public school students as "persons" protected under the Constitution, it has often endorsed restriction of student expression based on an assumption that the child has a limited capacity to rationalize.[152] Since the emergence of First Amendment rights in the classroom, the debate concerning the capacities of children has factored into the freedom of expression analysis.[153] David Moshman has explored the First Amendment application to children through five components of constitutional analysis. Moshman filters the First Amendment as applied to children through the text of the First Amendment,[154] the original intent,[155] constitutional theory,[156] precedent,[157] and values.[158] Moshman con-

152. *See* MOSHMAN, *supra* note 124, at 25-32 (discussing the Court's reliance on "myths" or generalizations about children to endorse school restrictions on expression).

153. *Id.* at 63-66 (analyzing and discussing current data on the development of rationality in individuals); *see also* Paul C. Magnusson, *Student Rights and the Misuse of Psychological Knowledge*, *in* SCHOOLING AND THE RIGHTS OF CHILDREN 92-114 (Vernon F. Haubrich & Michael W. Apple eds., 1975) (citing the danger of "scientific" proof when school officials and courts use such psychological data to further restrict children's rights).

154. *See* MOSHMAN, *supra* note 124, at 25 (finding no language in the text of the First Amendment to support any distinction between adults and children).

155. *Id.* at 25-26 (pointing out that even though there is an argument that the framers were only considering adults in drafting the Bill of Rights, the original intent argument in this context has been rejected). For example, Moshman points out that it was once argued that the framers only had "white males in mind" when drafting the Bill of Rights. *Id.* at 26. History has proven that regardless of the First Amendment's original intent, the Fourteenth Amendment guarantees all people equal protection, regardless of their gender or skin color. Moshman relates this observation to the change in the original relationship between the government and children through the creation of public schools. *Id.*

156. *Id.* at 26-27 (rejecting the theory that the First Amendment stands solely for the protection of political speech and, therefore, only provides protection for voters to debate political topics). Moshman responds to those who make this argument with his line of reasoning: "Even if minors are not permitted to vote, their views may constitute a relevant contribution to political debate." *Id.* at 27. Furthermore, Moshman points out that the courts have recognized that there can be no "sharp line" between treatment of political and nonpolitical speech. *Id.*

157. *Id.* (describing First Amendment precedent as applied to children as "at best highly complex and multifaceted and at worst mutually contradictory"). The contradiction is evident by the approach taken in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) and that of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Moshman explains the *Hazelwood* approach as taking the position that children are "fundamentally different from adults." MOSHMAN, *supra* note 124, at 27. *Tinker*, on the other hand, represents the approach that the First Amendment law should apply to children "with due allowance for the special characteristics of children where appropriate." *Id.* Moshman advocates the *Tinker* approach to guide future First Amendment applications to children. *Id.*

158. *Id.* at 27-29 (pointing to three values in support of recognized First Amendment rights for children). First, Moshman recognizes the importance of "intellectual freedom" to "protect the dignity of the rational individual." *Id.* at 28. Second, Moshman offers alternative support for these values in the role to promote truth. *Id.* He recognizes the counter argument to the first

cludes that even after the analysis of the five components, children's rationality can often become an aspect of a First Amendment inquiry.[159]

Moshman highlights the importance of interpreting children's First Amendment rights with empirical evidence regarding kids.[160] Moshman suggests that although empirical evidence is never enough to decide a constitutional issue, the Court should not exclude such evidence or rely on myth or limited knowledge.[161] The key to Moshman's analysis is his interpretation of the empirical evidence showing support for the "Emergence of Rationality."[162] His theory of why and how the First Amendment applies to children is based on social and behavioral science.[163] Moshman traces the "development of rationality"[164] in children in their deductive reasoning, inductive reasoning, and moral reasoning to determine at what point a child should receive full First Amendment protection.[165]

Deductive reasoning involves an understanding of a set of premises and a conclusion drawn therefrom.[166] Although there have been many studies on deductive reasoning, Moshman admits that the debate and controversy over the development of children's deductive reasoning is lively and continues to remain unsettled in areas like progress and transition.[167] Moshman defines four developmental stages of deductive reasoning to map the gradual process of an individual's

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two values as that which questions the rationality of children. *Id.* Moshman's response to this attack is two fold: First, many older children and adolescents are as rational as adults. *Id.* Second, these children need intellectual freedom in order to develop rationality. *Id.* The last value Moshman suggests is the timeless societal value in the "autonomy and privacy of family." *Id.* This value, although not explicitly mentioned in the Constitution, suggests the level of government interference in children's expression in light of the strong parental role. *Id.* at 29.

159. *Id.* at 32-33.

160. *Id.* at 29 (suggesting that psychological research data will provide a basis for the ages of development and rationality).

161. *Id.* at 30 ("It should be clear . . . that neither the legal framework alone nor the psychological research alone can resolve the question of children's rights: each is necessary and neither alone is sufficient.").

162. *Id.* at 62-91 (outlining several definitions of rationality and the pitfalls of a broad or narrow definition).

163. *Id.* at 3.

164. *Id.* at 66.

165. *Id.* (recognizing that based on the evidence, there are some children, below a certain age, who are obviously less rational than any normal adult and should have some restrictions on their First Amendment rights).

166. *Id.* at 66-67.

167. *Id.* at 67.

progress. These stages focus on content,[168] inference,[169] explicit logic,[170] and explicit metalogic.[171] Moshman cautions that the ages of individuals in each stage can differ substantially and because the development is gradual, children may be in a transition between stages rather than a true fit in one stage or another.[172] Moshman concludes that because most individuals reach the explicit logic stage in late childhood or early adolescence and rarely reach the final stage, there is very little distinguishing the level of deductive reasoning in adolescence from that in adulthood.[173] Because deductive reasoning is a narrow focus of reasoning, the analysis must also include inductive reasoning.

Inductive reasoning involves "forming generalizations, dealing with uncertainties and probabilities, testing hypotheses, and understanding the nature of reality, knowledge, and the relation between these."[174] Again, Moshman explores the four stages of inductive reasoning development: 1) focus on content,[175] 2) awareness of subjectivity,[176] 3) explicit theory,[177] and 4) explicit metatheory.[178]

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168. *Id.* at 67-68. This first stage can be found in some preschool children especially if rationality is defined as "simply . . . a matter of correct inference, one could make a case that even five-year-olds . . . are not qualitatively less rational than adults." *Id.* at 67. Moshman describes young children as focusing on content rather than thinking about inference. *Id.* at 67-68.

169. *Id.* at 68-69. Most children in stage two are in their elementary school years. These children can gain information through inference, rather than just from direct observation. *Id.*

170. *Id.* at 69-72. This third stage is usually reached by age eleven or twelve. *Id.* at 70. This stage requires that the individual have the ability to distinguish "inferential validity" from "empirical truth" and, therefore, are able to have "sufficient metalogical understanding to recognize when a conclusion is logically necessary." *Id.* at 70. Moshman discusses several different experiments to test this stage. *Id.* at 71-72.

171. *Id.* at 72. Moshman describes this final stage as requiring a "knowledge about the nature of logical systems." *Id.* He notes that most individuals never reach this stage as children or adults. *Id.*

172. *Id.* at 67.

173. *Id.* at 72-73.

174. *Id.* at 73.

175. *Id.* at 73-74. The evidence of the ability of young children to learn language suggests inductive learning. *Id.* The typical Stage One child is a preschooler and, similar to Stage One deductive reasoning, the child will focus on the "content of the reasoning rather than the process." *Id.* at 74.

176. *Id.* at 74-75. The children in Stage Two can separate their own knowledge from reality. *Id.* at 74. In other words, these children can appreciate that others may differ in their ideas about the same object or concept. Elementary school children are usually capable of recognizing their own subjectivity and, therefore, fall into Stage Two. *Id.* at 75.

177. *Id.* at 75-77. The Stage Three individual has a better understanding of theory and "its relation to data." *Id.* at 75. The individuals in this stage, usually teens and adults, can conceptualize theories as an abstraction of possibilities rather than just concepts of reality. *Id.* at 76. Moshman contends that most normal adults fall into Stage Three. *Id.* at 77.

178. *Id.* According to Moshman, and the research he relies on, Stage Four reasoning is not found in many adults, even those with advanced education. *Id.* This stage involves a higher

The development of inductive reasoning in adults appears to be comparative to the research in deductive reasoning.[179] Again, most individuals reach the third stage by focusing on inferences (in deductive reasoning) and explicit theory (in inductive reasoning) in early adolescence, and most never reach the fourth metatheoretic stage.[180] The research and conclusions have led Moshman to decide that most children over eleven years old can rationalize similarly to an adult.[181]

The development of moral rationality is an important element of Moshman's analysis because, as he points out, moral arguments are often presented to limit First Amendment protections for children.[182] Although much evidence has suggested that children do have a concept of morality, the importance of morality rests on an individual's ability to understand his or her reasoning about moral situations, not just his or her idea of what is right and wrong.[183]

The development of moral reasoning was traced through six stages by Lawrence Kohlberg in 1984.[184] The six stages represent increasing levels of rationality in which individuals gradually progress and often display reasoning from two, and often more, stages.[185] The stages, heteronomous morality,[186] individualism and exchange,[187] mutual ex-

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coordination of theory and data to further understand approaches to testing theories. *Id.* Moshman describes the result as an "increasingly explicit philosophy of science." *Id.*

179. *Id.*

180. *Id.* at 77-78.

181. *Id.* at 78. Moshman concludes "[i]t is difficult to make a case that adolescents beyond the age of about 11 are fundamentally less rational than the normal adult." *Id.*; *see* HERBERT P. GINSBURG & SYLVIA OPPER, PIAGET'S THEORY OF INTELLECTUAL DEVELOPMENT 204 (3d ed. 1988) (noting that although Piaget found that young adolescents are able to distinguish their own thoughts from the outside world, he also suggested that normal teens may not reach a stage of logical thinking until between 15 and 20 years of age).

182. MOSHMAN, *supra* note 124, at 78. This argument to limit the First Amendment rests on the paternalistic reasoning that children have little sense of morality and therefore must be sheltered from "morally wrong" material. *Id.*

183. *Id.* at 78-79. Moshman cites to the studies of Jean Piaget as the first to get beyond children's conceptions of morality to explore the sophistication of their moral reasoning. *Id.*

184. *Id.* at 79 (citing 2 LAWRENCE KOHLBERG, ESSAYS ON MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES (1984)). Moshman explains Kohlberg's theory to be "[t]he most systematic effort to pursue this insight" into the development of moral reasoning. *Id.* Kohlberg's theory was in part a reaction to the studies of Jean Piaget on the evolution of children's morality. *Id.*

185. *Id.* at 79. Americans, as well as individuals from other cultures, appear to progress invariantly through the stages. *Id.*

186. *Id.* at 80 (describing a Stage One child as one who "perceives moral behavior as what does not get punished").

187. *Id.* at 80 (cited as a stage predominant in elementary school children who recognize that other individuals have interests which may be different from their own).

pectations,[188] social system,[189] social contract,[190] and universal ethical principles,[191] serve to mark development of moral reasoning. Although there is no comparative study to match Kohlberg's theory, Moshman articulates the disagreements and criticisms, which the six stages have endured.[192]

The evidence from the available theories leads Moshman to conclude that although young children do understand moral concepts, there is more of a basis to distinguish preschoolers and young children from adults than there is a basis to differentiate adolescents from adults. Therefore, Moshman notes the difficulty "to imagine a case in which one could argue that adolescents as a group are sufficiently less rational than adults in conceptualizing moral issues [and] that they will be at a much greater risk than adults unless their First Amendment rights are restricted."[193]

Environment has been proven to determine the development of rationality.[194] In fact, active participation in one's environment, as opposed to passive observance, and opportunities "to confront multiple views"[195] are two critical factors for progression in learning and reasoning.[196] In other words, the more a child is exposed to different views and perspectives while actively interacting with his or her envi-

188. *Id.* at 80-81. The third stage is common in American teens and adults. This stage includes such realizations as the importance of relationships with others, based on caring for others. *Id.* "There is thus greater social rationality in the sense of a deeper appeal to and reflection on moral reasons." *Id.* at 81.

189. *Id.* at 81 (describing Stage Four as an acceptance and understanding of morality based on the abstractions of society, not just as an individual relationship). Morality at this stage is geared towards one's societal or religious duties to "preserve the social structure." *Id.* This stage can be found in teens and most American adults. *Id.*

190. *Id.* This stage can only be achieved by a small number of individuals. It "involves justification of Stage Five reasoning on the basis of explicit ethical principles that form a formal moral philosophy." *Id.* In order to achieve this stage, individuals must have an "intense experience in ethical evaluation (e.g., some judges, theologians, and moral philosophers)." *Id.*

191. *Id.* at 81-82. This stage is not frequently found in normal individuals. *Id.* at 81. It involves a "prior-to-society" consideration of utilitarian concepts to achieve an overall good while preserving individual rights, a deontological concept. *Id.* at 81-82.

192. *Id.* at 83-85; *see also* Magnusson, *supra* note 153, at 102 (objecting to the reliance on Kohlberg's theory because "[t]he notion of granting or denying rights and privileges solely on the basis of competence—moral, cognitive, or even emotional—is objectionable when . . . extended to adult society").

193. MOSHMAN, *supra* note 124, at 83.

194. *Id.* at 86. Moshman points out the error in the belief that development is "programmed" and progress occurs according to a time clock. *Id.*; *see* GINSBURG & OPPER, *supra* note 181, at 218-28 (noting Piaget's recognition that a child moves from one stage to the next, subject to the child's interactions with his or her environment).

195. MOSHMAN, *supra* note 124, at 87.

196. *Id.* Moshman notes that facilitating this process is a crucial element in the role of education. *Id.*

ronment, the more quickly he or she can develop and grow intellectually.[197] Therefore, Moshman's theory tends to support a child's freedom to express and hear a variety of views since such a diverse marketplace would contribute to his or her intellectual development.

Based on the empirical evidence from deductive, inductive, and moral reasoning, Moshman responds to the argument used to limit the First Amendment protection of children on a theory of their limited rationality.[198] Moshman summarizes most theorists' cognitive development conclusions as generally recognizing "the last major stage transition as beginning no later than age 11 or 12 and see no general, qualitative difference between the typical adolescent and the typical adult."[199] Based on this evidence Moshman suggests that children's First Amendment rights be "restricted on the basis of limited rationality"[200] only if the government can show specific prevention of harm.[201]

3. *The Right and Duty of Public Schools To Discipline Children*

Although empirical evidence tends to prove equivalent levels of rationality in older children and adults, even theorists like Moshman note the distinction between protected expression and disruptive speech and conduct in the public school setting.[202] In fact, as the U.S. Supreme Court liberalized student expression in its important *Tinker* decision, it also explicitly stated that discipline in the public schools is the right and duty of school officials.[203] Therefore, a short exploration of school discipline serves to highlight the proper scope and function of controlling student expression and conduct.

Various forms of punishment are a standard method of discipline in today's schools.[204] The history of punishment is well established in the development of discipline in the schools.[205] A noted historian, Carl Kaestle, traced the relationship of public schooling and punish-

197. *Id.*

198. *Id.* at 89-91. Other research comports with Moshman's general conclusion "that children have substantial ability to make rational choices and that the decision-making of adolescents is . . . rarely distinguishable from that of adults." *Id.* at 89.

199. *Id.* at 89.

200. *Id.* at 90.

201. *Id.* at 90-91.

202. *Id.* at 92.

203. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 507 (1969). The Court stated that it has "repeatedly emphasized the need for affirming the comprehensive authority of the states and of school officials, consistent with the fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.*

204. See LANE, *supra* note 124, at 4-8 for a brief overview of discipline as a means of controlling students.

205. *Id.*

ment to instill moral values to the early nineteenth century.[206] Historical punishment was often severe in proportion to the pupil's behavior.[207] Punishment often "included flogging, shackling, humiliation, and time in the portable pillory."[208] In contrast, today's punishment usually includes the less physical punishment of suspensions, expulsions, limited forms of academic sanctions, and reasonable corporal punishment.[209]

Student discipline has been defined as "personal restraint"[210] which must "have a rational, school-connected purpose and . . . employ rational means to achieve the purposes to be served."[211] Thus, there must be a harmful threat to the educational environment before the school may discipline a student for undesirable behavior.[212] This discipline must also be necessary for the proper operation of the school and the educational process.[213]

The Court has even granted school officials the authority to discipline students for conduct occurring off school grounds.[214] Punishment for such conduct "must be supported by evidence that the student behavior outside school has a detrimental impact on the well-being of the other pupils, teachers, or school activities."[215] School authorities may not punish off-school activity if the conduct did not impact the welfare of the school or the student lacked actual or

206. *See* Carl F. Kaestle, *Social Change, Discipline, and the Common School in the Early Nineteenth Century America*, J. INTERDISC. HIST. 9 (1978).

207. LANE, *supra* note 124, at 10.

208. *Id.*

209. *See* MCCARTHY & CAMBRON-MCCABE, *supra* note 134, at 230-32 (noting the currently acceptable and legal forms of punishment used to discipline students); *see also* LANE, *supra* note 124, at 6 (discussing a potential swing back towards more stringent discipline). Lane notes the rising public concern about children's increasingly aggressive behavior towards authority and one another. LANE, *supra* note 124, at 6. Lane notes that since the 1960s, public opinion polls have shown a consistent concern over the effectiveness of school discipline. *Id.* Lane also mentions the 1984 federally sponsored report, *A Nation at Risk*, which concluded that the "dismal state of public education" was a threat to a viable U.S. economy and the country's future ability to compete in the global economy. *Id.* at 4.

210. VALENTE, *supra* note 135, at 313.

211. *Id.* (discussing students' substantive rights) (emphasis omitted).

212. *Id.*

213. See MCCARTHY & CAMBRON-MCCABE, *supra* note 134, at 231 for general guidelines concerning student control.

214. *See, e.g.*, Fenton v. Stear, 423 F. Supp. 767 (W.D. Pa. 1976) (upholding school discipline of a student who made an offensive comment at a local mall about a teacher to a group of students); *see* VALENTE, *supra* note 135, at 313 (citing off-school assaults on other students and drug sales to fellow students as reasonable grounds for school discipline); MCCARTHY & CAMBRON-MCCABE, *supra* note 134, at 203-04 (listing out-of-school fights, insulting remarks made to teachers, and insulting remarks made about a teacher in a public place as conduct warranting in-school discipline).

215. MCCARTHY & CAMBRON-MCCABE, *supra* note 134, at 203.

constructive knowledge that such punishment would result from his conduct.[216]

New approaches to student discipline have been enacted in partial response to the rising public concern about safety in the schools and in partial response to the ineffectiveness of the old approaches to positively influencing student behavior.[217] Educational scholars advocating fresh approaches stress the importance of student self-discipline, the development of a school-wide plan, the variety of in-class strategies, and the necessity of addressing the special needs of at-risk children.[218] The various approaches to student discipline are numerous and yet there remains a difficulty for most educators to get a grip on school behavioral problems.

The importance of classroom order to the proper functioning of educating children remains paramount. The Court captured the essential role of educators in its assertion of the educational function: "The primary duty of school officials and teachers . . . is the education and training of young people. A state has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students."[219]

4. *Bullying Behavior and the Four Ws*

Given the importance of an "orderly" and safe educational environment, the constant harassment of particular children by other children should be controlled and stopped since such activity will not only disrupt the educational process but also severely impact the children involved.[220] However, despite this disruption, many schools fail to

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216. *Id.* at 204.

217. See LANE, *supra* note 124, at 10-12 for data and public opinion polls showing concern for the safety of the schools.

218. *See* PAULA M. SHORT ET AL., RETHINKING STUDENT DISCIPLINE, ALTERNATIVES THAT WORK (1994) (drawing on research and practice to present a practical step to new approaches in discipline).

219. New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) (Powell, J., concurring).

220. This disruption is usually most severe for the bully's victim. For example, many children suffer from physical symptoms as a result of being picked on. *See* Katrina Williams et al., *Association of Common Health Symptoms with Bullying in Primary School Children*, BRIT. MED. J., July 6, 1996, at 17 (concluding from their study of primary school children in a London school district that frequent bullying behavior is associated with an increasing risk for the victim to suffer from headaches, stomach aches, depression, bedwetting, and sleeping difficulties). Another disruption results when "target" children actually skip school to avoid bullying situations at school. *Id.*; *see* Pamela Lister, *Bullies: The Big New Problem You Must Know About*, REDBOOK, Nov. 1995, at 118 (citing a recent survey by Frank J. Barone, Ed.D., who "found that 58 percent of students had actually stayed home from school at least once because they were [bullying] victims"). Often the bullying behavior of specific kids can impact how other children

adequately monitor and discipline bullying behavior.[221] Studies suggest that school administrators and teachers severely underestimate the pervasive nature of bullying.[222] This failure to recognize and control bullying behavior can often stem from the general feeling that bullying and teasing behavior is a normal experience of childhood.[223] This attitude has persisted for as long as the behavior has existed and society, including educators, has failed to recognize bullying as a type of destructive behavior warranting consistent surveillance.[224] However, recent tragedies and new research have ushered in a heightened awareness of bullying, as evident from the recent studies and literature on the subject.[225] Such research and commentary on bullying and the effects of such uncontrolled behavior has resulted in an exploration of the issues behind this typical childhood experience.

a. Who is a bully? Who is a target?

Who is a bully? Bullies have been described as a "special breed of children."[226] These children who engage in bullying have been shown to perceive events differently than most children.[227] This perception has been described as "a hostile attributional bias,"[228] which causes

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perceive the safety of the school. Lister, *supra*, at 136 (noting the results of a "recent nationwide survey of 65,000 sixth to twelfth graders [which found that] 43 percent of the public school students said they avoid using school bathrooms").

221. *See* Lister, *supra* note 220, at 119 (noting that school administrators and teachers "seriously underestimate the number of incidents" often because they fail to recognize bullying behavior and because some activities take place "out of their view—in hallways and bathrooms, on playgrounds and school buses"). It has also been noted that some schools fail to "act on reports of bullying for self serving reasons." *Id.* at 136. For example, some teachers do not want to appear as though they cannot monitor and control their students. *Id.*

222. *See* HAZLER, *supra* note 1, at 12 (noting that "[r]esearch tells us that bullying is a much larger problem than many adults, including professionals, realize").

223. *See* Hara E. Marano, *Big.Bad.Bully.*, PSYCH. TODAY, Sept.-Oct. 1995, at 52 (discussing American's slow realization of the harmful effects and consequences of bullying behavior); *see also* HAZLER, *supra* note 1, at 15 (noting that although "bullying is common . . . any implication that bullying has little impact on individuals because it is normal is clearly false").

224. *See* HAZLER, *supra* note 1, at 15 (finding that "[t]he fact that everyone has experiences with bullying may be a part of the reason that many people will see it as a normal aspect of life"). Hazler is optimistic that as research and programs dealing with bullying surface, the public, in particular schools and parents, will more clearly understand and identify the problem. *Id.* at 17.

225. *Id.* at 15; *see also* OLWEUS, *supra* note 1, at 1; *infra* notes 379-84 and accompanying text (describing the tragically fatal consequences of unchecked bullying).

226. *See* Marano, *supra* note 223, at 52 (stating that most children—sixty to seventy percent—are never involved in chronic bullying behavior).

227. *Id.* at 54 (describing the inability to process social information as resulting in a child's aggressive action).

228. *Id.* at 52.

the child to attribute hostile intentions in innocent activity.[229] Further problems come from the bully's inability to perceive himself accurately in his social situation.[230] Child psychologist Melissa DeRosier, Ph.D, of the University of North Carolina, finds that bullies are out of touch with how little they are liked by their non-victim peers.[231] In addition, she concludes that because of bullies' deficient social cognition they cannot "see the impact of their own behavior on others."[232]

While bullies share many common traits, research indicates that there are two distinct types of bullies.[233] The classic bully, often termed as "proactive" or "effectual," is aggressive and does not need a stimulus to lead to a confrontation with his victim.[234] He[235] is motivated by reward ("give me money") and is goal oriented.[236] The other type of bully, a "reactive bully" or "provocative victim," is someone who is sometimes the aggressor and sometimes the target of someone else's bullying.[237] These bullies have been described as being the worse off of the two types because they are motivated by perceived provocation, anger easily, and usually "lose fights" because of high levels of frustration and distress.[238] These bullies have the fewest friends, which increases the risks of the "external" perception problems of classic bullies and the "internal" problems of depression common to victims.[239]

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229. *Id.* (finding this type of paranoia to lead a bully to perceive such action as a dropped book by another as a "call to arms").

230. *Id.* at 54 (describing this inability as social "blindness").

231. *Id.* (citing DeRosier as stating that because bullies are a threat to others, they are unlikely to find out what other kids think of them). *But see* OLWEUS, *supra* note 1, at 35 (noting that bullies may be popular with students, although this popularity tends to decrease in high school). Professor Olweus further writes that "bullies do not seem to reach the low level of popularity that characterizes victims." *Id.*

232. Marano, *supra* note 223, at 54.

233. *Id.* at 64 (suggesting that the differences between the two types sheds light on how the bullying behavior takes shape).

234. *Id.* (terming these bullies as "classic playground bullies").

235. *Id.* at 70, 74. The pronoun "he" is used because studies show that although both boys and girls bully, girls engage most frequently in relational aggression. This activity is unique to females and involves "damaging or manipulating their relationships in aversive ways." *Id. See generally* Ann Douglas, *When Push Comes to Shove, Girls Are Ready with Psychological Torture*, CHI. TRIB., Mar. 2, 1997, § 13 at 1, 6 (noting the psychological torture some girls employ on others as a form of bullying).

236. Marano, *supra* note 223, at 64 (stating that these bullies often have friends—those who are also bullies).

237. *Id.*

238. *Id.* (citing the findings of Professor David Perry, Ph.D., of Florida Atlantic University).

239. *Id.*

The consistent victims, or targets, of bullying behavior also display a specific set of psychological characteristics.[240] There are two types of victims: the passive/submissive victim and the provocative victim.[241] The passive or submissive victim is described as "more sensitive, cautious, and quiet than other kids . . . and more anxious."[242] The provocative victim, a much smaller group of victims, is characterized as a combination of a passive victim with an aggressive reaction pattern.[243] Victims, usually the submissive ones, often have close relationships with their parents and are frequently raised in overprotective families.[244] This overprotection may prevent the victimized children from developing skills to avoid future victimization.[245]

b. What Defines Bullying Behavior?

Bullying behavior involves three core elements: a pattern of behavior between two children, based on "negative intent," where there is an imbalance of power between the bully and his victim.[246] A unique feature of bullying is the "chronicity" and the relationship that develops between a bully and his victim.[247] The aggression of a bully can be verbal, physical, or both, and studies show that as the bully gets older the aggression gets more intense and often takes the form of verbal threats.[248]

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240. *See id.* at 54 (noting that studies indicate that eight to nine percent of all children are constant targets of bullies).

241. *See* OLWEUS, *supra* note 1, at 32-33.

242. Marano, *supra* note 223, at 54 (stating that the victims often "set them[selves] up" for victimization by freezing when faced with conflict); *see* OLWEUS, *supra* note 1, at 32 ("[P]assive victims signal to others that they are insecure and worthless individuals who will not retaliate if they are attacked or insulted.").

243. OLWEUS, *supra* note 1, at 33. These children are described as "hyperactive" with behavior that "provokes many students in the class, thus resulting in negative reactions from a large part, or even the entire, class." *Id.*

244. Marano, *supra* note 223, at 56 (citing overprotection as the reason these kids never learn to "handl[e] conflict").

245. *Id.*

246. *Id.* at 52 (stating that "[b]y definition, the bully's target has difficulty defending him-or herself, and the bully's aggressive behavior is intended to cause distress"); *see* HAZLER, *supra* note 1, at 6 (defining bullying as "repeatedly . . . harming others . . . by physical attack or by hurting others' feelings through words, actions, or social exclusion . . . where the bully is . . . stronger than the victim"); OLWEUS, *supra* note 1, at 9 ("A student is being bullied or victimized when he or she is exposed, repeatedly and over time, to negative actions on the part of one or more other students . . . .").

247. *See* HAZLER, *supra* note 1, at 3-19 (describing bullying as a "cycle of violence"); Marano, *supra* note 210, at 52, 56 (describing the ongoing relationship between the bully and victim as a "dance" of frequent interaction).

248. *See* Marano, *supra* note 223, at 52 (describing the verbal aggression as "name-calling, taunts, threats, ridicule, and insults" and the physical aggression as "pushes and shoves and hitting, kicking, and punching").

c. Where Does This Behavior Begin and to Where Does It Lead?

The research shows that the roots of aggression point to the preschool years and continue through elementary and middle school.[249] Most severe bullying is reported to occur around the time of puberty.[250] Most young bullies are up to par with the intellectual level of their schoolmates, but as bullies mature, their aggressive behavior often disrupts their intellectual skills.[251] Unfortunately, this form of behavior can continue into adulthood in the form of crime and domestic violence.[252]

On the other hand, the children who are victims are usually submissive before they are targeted.[253] Psychologist David Schwartz studied children's play groups and identified submissive children and the reason they become targets for bullies.[254] He found that when children were submissive in nonconfrontational situations it made them easy targets for future aggressive situations.[255] This behavior creates a downward spiral: "[B]eing victimized leads to feeling bad . . . [and] feeling anxious, which then increases vulnerability to further victimization."[256]

The results of victimization lead to an internal and external isolation of the constantly targeted child.[257] The victim internalizes much of the teasing and taunting and as a result feels very lonely.[258] This withdrawal can lend itself to high achievement in academics where the victim can retreat from his or her surroundings or, conversely, leads the victim down the path of low motivation or self-esteem in all aspects of his or her life.[259] The external isolation is a result of children

249. *See id.* at 54 (reporting that through elementary school, or grade six, bullies are of "average popularity," but as they get older, their popularity decreases). As bullies wind their way through high school, "increasingly their behavior is acceptable only to others like themselves; fortified with their hostile cognitive style and growing contempt for the values of others, they spin their way to outcast lifestyle." *Id.* at 69.

250. *See* HAZLER, *supra* note 1, at 58 (reporting the "worst times" of bullying occur between the sixth and ninth grades); Marano, *supra* note 223, at 54 (noting that most bullying occurs between the ages of 8 and 16).

251. Marano, *supra* note 223, at 69.

252. *Id.*

253. *Id.* at 56.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *See id.* at 56 (noting that these children also suffer physical signs of consistent bullying such as headaches and stomach pains); Williams, *supra* note 220, at 17 (concluding that many victimized children suffer a variety of physical symptoms as a result of being bullied).

259. Marano, *supra* note 223, at 56 (finding that many of these children dislike school because of the hostile environment).

other than the bullies disassociating themselves from the victimized child.[260] Therefore, the victimized child usually has very few friends and may suffer physically from severe bullying.[261]

d. Why Do Bullies Act the Way They Do?

Studies have also been conducted into how bullies become the way they are. Most research points to circles of aggression or lack of monitoring a child's behavior.[262] In fact, it has been noted that the "life of aggression" is instilled in children by age two.[263] Because children of that age can only communicate through their actions or conduct, adult intervention in aggression and development of language skills will curb or stop such aggression.[264] Children who receive adequate caregiver interaction and instruction in earlier years tend to master language skills and rely less on physical aggression to communicate.[265] Therefore, low language skill is an important key to deciphering why bullies rely on aggression to communicate with others.[266]

Of course, the child-parent role beyond the early years plays an important part in a bully's development. When a child frequently disobeys his or her parent, and such disobedience goes unpunished, the child fails to recognize his noncompliance.[267] Because the child may not recognize his wrongdoing, the child fails to understand why his parents get upset and punish him for certain acts and not others.[268] Inconsistent and, typically, physical punishment causes these children to develop a mistrust of the world and reinforces their aggressive be-

260. *Id.* (highlighting the fact that this isolation is a severe form of stress and is very damaging to the child's self image).

261. *Id.* (noting that the rejection by other children "deprives" the victims from social opportunities to build their self confidence).

262. *Id.* at 69; *see* Lister, *supra* note 220, at 119 (noting that children "grow up with less supervision than did previous generations"); *see also Bullies See More of TV Violence, Less of Adults*, BROWN UNIVERSITY CHILD AND ADOLESCENT BEHAVIOR LETTER, Oct. 1996, at 6 [hereinafter BEHAVIOR LETTER] (reporting that the results of a study indicated that middle school children who engage in bullying behavior did not spend as much time with adults as their non-bullying peers did). These children also were reported to have fewer adult role models. BEHAVIOR LETTER, *supra.*

263. Marano, *supra* note 223, at 70 (citing Richard E. Tremblay, Ph. D., who notes that physical aggression is normal at age two).

264. *Id.* (citing Tremblay who notes that once "[l]anguage skills increase, . . . physical aggression decreases").

265. *Id.*

266. *Id.* "In humans, even in beefy boys, social dominance has less and less to do with physical aggression—and more and more with language." *Id.*

267. *Id.* at 79 (noting that this disobedience usually involves trivial, daily matters such as failure to make the bed or wash hands before eating).

268. *Id.* (describing these events as a process which begins to control parents' behavior).

havior towards others.[269] Most parents fail to understand that when they punish their child for his aggressive behavior with harsh punishment, they only reinforce the circle of aggression.[270]

e. How Are Schools and Parents Responding?

As the research on bullying surfaces, the results indicate that schools are not effectively responding to bullying behavior.[271] Studies also indicate that even parents are not responding to this problem, usually because the parents are unaware of the situations.[272] Despite these research results, more and more parents, teachers, and schools have recognized this problem. Some of this recognition may have been prompted by recent events that illustrate extreme severity of uncontrolled bullying.[273] Some of the tragedies that have resulted from bullying situations have "opened the eyes" of many parents, communities, and schools to the extensive harm children can cause one another.[274] The reaction to control this age-old problem has been twofold: schools have become more active in monitoring and controlling bullying behavior[275] and in counseling both the bully and his victim through a variety of programs.[276] An emphasis on family and child participation has also been a focus of prevention and correc-

269. *Id.* at 82 (citing that these kids usually expect others to "treat them unfairly and unpredictably").

270. *Id.* (noting parents' failure to reinforce prosocial behavior when their child does something good).

271. *See* HAZLER, *supra* note 1, at 17 (noting that "two out of three children report that schools handle the problem of bullying poorly"). Hazler also found that many kids believed their teachers did not know that bullying behavior was occurring in their classrooms. *Id.*; *see also* OLWEUS, *supra* note 1, at 20 (concluding from student questionnaire responses that students see their teachers doing "relatively little to put a stop to bullying at school").

272. *See* OLWEUS, *supra* note 1, at 21.

273. *See* Marano, *supra* note 223, at 51. The author described the events concerning two boys in their early teens who killed themselves due to severe teasing situations at school. *Id.*; *see infra* notes 379-84 and accompanying text (discussing these events).

274. *See 20/20: Teased, Taunted, and Bullied* (ABC television broadcast, Apr. 28, 1995) [hereinafter *20/20*] (noting that this problem now receives more attention because of the increased access children have to guns and the potential fatal consequences).

275. *See* Laura Wisniewski, *Metro Schools Pursue Ways To Handle Bullies*, ATLANTA J. & CONST., Apr. 10, 1994, at D8 (noting a Georgia school's approval of a specific student harassment policy). This specific policy gives parents a vehicle to demand a bullying situation be addressed. It also gives the principal the discretion in punishment determinations. *Id.*

276. *See* Marano, *supra* note 223, at 53 (suggesting that parents enroll their children in a "social skills group"); *see also* Wisniewski, *supra* note 275 (noting the need for counseling for both the victim and the bully in order to get to the roots of their problems); *20/20*, *supra* note 274 (discussing a model program at a Florida elementary school where students use role playing to build their self esteem in dealing with confrontational situations). *See generally* HAZLER, *supra* note 1, at 65-206 (discussing his Promoting Issues in Common program as a "model for therapy" for bullies and victims).

tion.[277] Overall, the consistent goal of most programs is for the children to gain control over the situation and build their self-esteem, rather than simply to punish the bullying child.

A variety of "programs" for schools, teachers, and parents to control bullying are becoming more available as research and awareness increases. One such program, designed by Professor Dan Olweus, is a scientifically evaluated intervention program that provides a variety of measures at the school, class, and individual level.[278] Professor Olweus identifies the goal of the program as the reduction and, ideally, the elimination of bullying problems on and off the school yards.[279] Professor Olweus has scientifically evaluated his program through follow-up research on the schools and teachers using his program.[280] This research indicates that schools that use this program (or certain aspects of it) have cut their bully-victim problems in half and have reported an improved "social climate" in the classroom.[281] Professor Olweus has also identified from this research that one of the core elements necessary to the success of this intervention program is the support from the principal or other school administrator and the "awareness and involvement" of the teachers and parents.[282]

Although there are several advocated programs designed to control bullying behavior, these programs can only survive with the support of parents, teachers, school administrators, and ultimately the community.[283] Knowing the seriousness of bullying behavior and the lifelong consequences it can have on its participants, what can "remedy" this problem when the parents, teachers, and schools fail to address the bullying problems in its own community? North Dakota recently faced this issue when one of its communities allegedly failed to address its bullying problems. This state's "legal solution" is the focus of Part II and Part III.

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277. See Marano, *supra* note 223, at 53, 55, 57 for tips on parent-child strategies to combat the downward spiral and methods for facing the bully. Marano also notes methods of controlling and helping the bully-child. *Id.* at 82. It is recommended that the parent break the circle of aggression by consistently applying "nonhostile, nonthreatening, nonphysical sanctions" when the child disobeys. *Id.*; *see also* Donna W. Lewis, *Parents Can Help Kids Learn to Step in and Halt Harassment*, ATLANTA J. & CONST., Apr. 10, 1994, at D8 (discussing more suggestions on how parents can help their children to deal with a bully).

278. OLWEUS, *supra* note 1, at 63-67.

279. *Id.* at 65.

280. *Id.* at 111-18.

281. *Id.* at 113-14.

282. *Id.* at 122-23.

283. *Id.*

II. SUBJECT OPINION: *SVEDBERG V. STAMNESS*[284]

A. Facts and Procedural History

This case arose from a persistent bullying situation which involved two boys: The "bully" was in his mid-teens[285] and his "target" was in his early teen years[286] when this dispute came to court. Anthony Stamness had called Christian Svedberg "Dumbo" on many occasions, making reference to Svedberg's ears and on one occasion stated, "[y]ou had better watch it Dumbo or I will kill you."[287] One winter, Stamness and others also constructed three large snow figures in their small farming community.[288] These snowmen had very large ears and were understood by Svedberg and others to be representations of himself.[289] Svedberg became very frightened to attend school due to Stamness' conduct.[290] He also became very depressed and there were reported suicidal comments.[291] Svedberg's parents spoke to school officials about the "Dumbo" name-calling incidents.[292] There was no reported action taken by the school, so Svedberg's parents sought the issuance of a disorderly conduct restraining order.[293]

The district court determined that Stamness' threats against Svedberg's physical safety, "incessant teasing," and harassment were intended to affect adversely Svedberg's safety, security, and privacy.[294] As a result the district court ordered:

> Anthony Stamness shall have no contact with Christian Svedberg and shall cease or avoid the following specific conduct: Uninvited visits to the Petitioner, harassing phone calls to the Petitioner, calling the Petitioner abusive names (including "Dumbo"), or any other conduct which injures the Petitioner, either physically or emotionally, including the construction and public display of any effigy of Christian Svedberg.[295]

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284. 525 N.W.2d 678 (N.D. 1994).

285. 525 N.W.2d at 685 (Levine, J., dissenting) (stating that Stamness was born August 27, 1977, making him seventeen years old at the time of this suit).

286. *See 20/20*, *supra* note 274 (stating that Svedberg was thirteen years old at the time of the interview—which took place after the North Dakota Supreme Court rendered its decision).

287. *Svedberg*, 525 N.W.2d at 680.

288. *See 20/20*, *supra* note 274 (noting that this incident took place in Northwood, North Dakota).

289. *Svedberg*, 525 N.W.2d at 680.

290. *Id.* at 679.

291. *Id.* at 684.

292. *Id.* at 685.

293. *Id.*

294. *Id.* at 680.

295. *Id.*

The procedural history of this case involves Stamness' appeal of this two-year disorderly conduct restraining order. The order was issued under North Dakota's Disorderly Conduct Restraining Order statute,[296] which enjoined "specific threatening, abusive, and assaultive

296. N.D. CENT. CODE § 12.1-31.2-01 (Supp. 1995). The statute provides:

Disorderly conduct restraining order—Penalty.

1. "Disorderly conduct" means intrusive or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another person. Disorderly conduct does not include constitutionally protected activity.

2. A person who is a victim of disorderly conduct or the parent or guardian of a minor who is a victim of disorderly conduct may seek a disorderly conduct restraining order from any court of competent jurisdiction in the manner provided in this section.

3. A petition for relief must allege facts sufficient to show the name of the alleged victim, the name of the individual engaging in the disorderly conduct, and that the individual engaged in the disorderly conduct. An affidavit made under oath stating the specific facts and circumstances supporting the relief sought must accompany the petition.

4. If the petition for relief alleges reasonable grounds to believe that an individual has engaged in disorderly conduct, the court, pending a full hearing, may grant a temporary disorderly conduct restraining order ordering the individual to cease or avoid the disorderly conduct or to have no contact with the person requesting the order. A temporary restraining order may be entered only against the individual named in the petition. The court may issue the temporary restraining order without giving notice to the respondent. The temporary restraining order is in effect until a hearing is held on the issuance of a restraining order under subsection 5.

5. The court may grant a disorderly conduct restraining order ordering the respondent to cease or avoid the disorderly conduct or to have no contact with the applicant if:

a. A person files a petition under subsection 3;

b. The sheriff serves the respondent with a copy of the temporary restraining order issued under subsection 4 and with notice of the time and place of the hearing;

c. The court sets a hearing for not later than fourteen days after issuance of the temporary restraining order unless the time period is extended upon written consent of the parties, or upon a showing that the respondent has not been served with a copy of the temporary restraining order despite the exercise of due diligence; and

d. The court finds after the hearing that there are reasonable grounds to believe that the respondent has engaged in disorderly conduct. If a person claims to have been engaged in a constitutionally protected activity, the court shall determine the validity of the claim as a matter of law and, if found valid, shall exclude evidence of the activity.

6. A restraining order may be issued only against the individual named in the petition. Relief granted by the restraining order may not exceed a period of two years. The restraining order may be served on the respondent by publication pursuant to rule 4 of the North Dakota Rules of Civil Procedure.

7. A disorderly conduct restraining order must contain a conspicuous notice to the respondent providing:

a. The specific conduct that constitutes a violation of the order;

b. Notice that violation of the restraining order is punishable by imprisonment of up to one year or a fine of up to one thousand dollars or both; and

c. Notice that a peace officer may arrest the respondent without a warrant and take the respondent into custody if the peace officer has probable cause to believe the respondent has violated an order issued under this section.

8. If the respondent knows of an order issued under subsection 4 or 5, violation of the order is a class A misdemeanor. If the existence of an order issued under subsection 3

behaviors directed at Christian Svedberg."[297] Stamness appealed the district court's finding of "reasonable grounds" to support the order and the improper restraint the order placed on his First Amendment rights.[298] The North Dakota Supreme Court affirmed the district court's order.[299] This opinion was filed in December 1994.[300]

B. *Majority Opinion*

The majority addressed both of Stamness' issues in its review and attacked the first contention concerning reasonable grounds by reviewing the substance of the statute at issue.[301] The statute allowed a court to restrain conduct when it finds that "there are reasonable grounds to believe that the respondent has engaged in disorderly conduct."[302] The majority, however, noted that the statute did not define "reasonable grounds."[303] The absence of such a definition meant that the court had to review state case law.[304] The majority determined that reasonable grounds existed for the purposes of the statute when "facts and circumstances presented to the judge are sufficient to warrant a person of reasonable caution to believe that acts constituting the offense of disorderly conduct have been committed."[305]

The majority concluded that Stamness' contention of district court error must fail based on review of the transcripts and the deference given to the trial judge's expertise.[306] In fact, the majority noted in a footnote that the trial court actually required the petitioner to show

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or 4 can be verified by a peace officer, the officer, without a warrant, may arrest and take into custody an individual whom the peace officer has probable cause to believe has violated the order.

9. The clerk of court shall transmit a copy of a restraining order by the close of the business day on which the order was granted to the local law enforcement agency with jurisdiction over the residence of the alleged victim of disorderly conduct. Each appropriate law enforcement agency may make available to its officers current information as to the existence and status of any restraining order involving disorderly conduct.

10. Notwithstanding subsection 5 of section 11-16-05, a state's attorney may advise and assist any person in the preparation of documents necessary to secure a restraining order under this section.

Id.

297. *Svedberg*, 525 N.W.2d at 679.

298. *Id.* at 680.

299. *Id.* at 679.

300. *Id.* at 678.

301. *Id.* at 681.

302. *Id.* (quoting N.D. CENT. CODE § 12.1-31.2-01(4) (Supp. 1995)).

303. *Id.* at 681.

304. *Id.* (citing several cases that discussed "reasonable grounds" for DUI arrests).

305. *Id.* at 682.

306. *Id.*

by a preponderance of evidence that the order should be issued, that is, a "more stringent standard than contemplated by the statute."[307]

The majority then turned to Stamness' second contention based on a First Amendment argument.[308] The statute included a "disclaimer" that disorderly conduct does not include constitutionally protected activity.[309] Stamness sought to fit his speech and expression into that loophole and gain immunity from the order.[310]

In response to Stamness' contention, the majority launched into a discussion of the First Amendment and supporting the U.S. Supreme Court decisions.[311] It contended that although the First Amendment usually prohibits the government from proscribing speech it dislikes, not all speech is constitutionally protected.[312] The majority relied on the categorization approach of the U.S. Supreme Court to evaluate whether Stamness' expression qualified as "fighting words."[313]

The majority applied the *Chaplinsky* incitement-to-violence test: "To determine if an expression constitutes fighting words, we must ask whether the expression if delivered to a reasonable and prudent person of common intelligence, would cause the addressee immediately to breach the peace."[314] The majority also determined that based on the "elusive nature of fighting words" it should look at both the content and the context of the expression (including the age of the participants).[315] Under this approach, the majority found Stamness' expression as a whole constituted fighting words and was, therefore, unprotected by the First Amendment. The majority concluded that there were sufficiently reasonable grounds to support the disorderly conduct restraining order and that Stamness was not engaged in protected activity.[316] It consequently affirmed the district court's holding.[317]

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307. *Id.* at 682 n.2.

308. *Id.* at 682.

309. *Id.* (quoting N.D. CENT. CODE § 12.1-31.2-01(1) (Supp. 1995)).

310. *Svedberg*, 525 N.W.2d at 682 n.3. Stamness did not challenge the constitutionality of the statute itself.

311. *Id.* at 682-84.

312. *Id.* (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), Roth v. United States, 354 U.S. 476 (1957), Cohen v. California, 403 U.S. 15 (1971), and R.A.V. v. St. Paul, 505 U.S. 377 (1992)); *see supra* notes 27-35, 61-65, 73-84 and accompanying text (discussing *Chaplinsky*, *Cohen*, and *R.A.V.*).

313. *Svedberg*, 525 N.W.2d at 682.

314. *Id.* at 683 (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

315. *Id.*

316. *Id.* at 684.

317. *Id.*

C. Concurring Opinion

The concurrence labeled Stamness' speech as something other than fighting words to prohibit his expression.[318] The two concurring justices analyzed Stamness' expression as "threatening conduct" instead of the majority's fighting words approach.[319] The concurrence's analysis included an approach very similar approach to that of the majority: "No precise words are necessary to convey a threat. . . . A threat often takes its meaning from the *circumstances* in which it is spoken and . . . in the *context* in which . . . [it is] recited."[320] The concurrence found that Stamness' expression that accompanied or followed his threatening conduct could not be constitutionally protected and therefore affirmed the district court decision.[321]

D. Dissenting Opinion

The dissenting opinion, written by Justice Levine, found the majority and the concurrence to be overstepping their bounds, intruding into what should be a family and school matter.[322] Justice Levine looked at the legislative history of the North Dakota stalking statute. She highlighted that this statute was passed to address domestic violence and the need to control stalking.[323] The statute was necessary to allow courts to issue a civil restraining order to protect victims of stalking, even if the victim did not suffer physical abuse by her stalker.[324] Justice Levine found proof in the legislative history and the statutory language to support a legislative intent of the statute at issue to "protect the victims of stalking and intimidation from conduct by perpetrators which had put them in fear for their lives, their safety, [and] their security."[325] Justice Levine found it necessary to filter the facts of the case through both the words of the statute and the legislative history.[326]

The dissent also addressed the majority's First Amendment analysis.[327] Justice Levine looked at the evolution of the fighting words doctrine and concluded that fighting words must be personally abusive

318. *Id.* at 684-85.
319. *Id.*
320. *Id.* at 685 (emphasis added).
321. *Id.*
322. *Id.* at 687 (Levine, J., dissenting).
323. *Id.* at 685-86; *see also* Minutes, *supra* note 113 (discussing legislative intent).
324. *Svedberg*, 525 N.W.2d at 686 (Levine, J., dissenting).
325. *Id.*
326. *Id.*
327. *Id.*

and likely to provoke a violent reaction.[328] She reminded the majority that the recent U.S. Supreme Court decision in *R.A.V. v. City of St. Paul* mandated a narrow interpretation of fighting words.[329] Although Justice Levine acknowledged Stamness' infliction of pain and embarrassment on Svedberg, she did not agree that calling another "Dumbo" and erecting three snowmen would be likely to cause an objective person to immediately breach the peace.[330] In fact, according to Justice Levine's interpretation of fighting words jurisprudence, Svedberg's pain was an irrelevant factor in the fighting words determination.[331] The dissent questioned the appropriateness of the majority's decision in light of other U.S. Supreme Court case law: "And, if the first amendment protects 'virulent ethnic and religious epithets,' . . . and threats to 'break your damn neck . . . [if you go into racist stores]', . . . how can it be possible that it does not protect saying 'Dumbo' and making snowmen?"[332]

The dissent further disagreed with the concurrence that Stamness' conduct was a threat of violence.[333] She pointed out that Stamness did not engage in any physical conduct such as pushing, shoving, hitting, or pinching.[334] She furthermore found Stamness' statement that he would kill Svedberg to be a "bluster" and not a true threat.[335] Even so, Justice Levine indicated that she may have joined the majority if the restraining order had been limited to prohibit further threats of violence.[336]

Justice Levine also criticized the majority's treatment of the stalking statute. She found that the majority's construction of the statute's application turned it into an "overbroad, unconstitutional statute, at least as applied."[337] She warned her fellow justices that the U.S. Supreme Court looks to a state supreme court's construction of a stat-

328. *Id.*

329. *Id.*

330. *Id.* at 687. Justice Levine agreed with the majority that it is important to look at the context of a situation to determine whether speech constitutes fighting words. *Id.* at 686. However, Justice Levine did not agree that "given the context of this case, that erecting three snowmen with big ears and calling someone 'Dumbo' can be constitutionally prohibited by a court." *Id.*

331. *Id.* at 686.

332. *Id.* (alterations in original) (citations omitted) (quoting respectively United States v. Eichman, 496 U.S. 310, 318 (1990) and NAACP v. Claiborne Hardware Co., 458 U.S. 886, 902 (1982)).

333. *Id.*

334. *Id.* at 687.

335. *Id.* The court found that Stamness may have been "an insensitive, teenage clod" but that his conduct was "[n]ot the stuff violence is made of." *Id.*

336. *Id.*

337. *Id.*

ute to determine whether a challenged statute passes constitutional muster. She wrote that there is a great need for this statute and hopes future application will be within the confines of the Constitution.[338]

The dissent concluded that this case belonged back in the school where parents and school authorities have extensive power to control their children.[339] She contended that the majority's approach allows the court to "step into the breach" of the school's and parent's responsibility, rather than encouraging the community to resolve "'ordinary problems of daily living.'"[340]

E. Subsequent Legislative Response

Several months after the *Svedberg* decision was issued, the North Dakota legislature amended the Disorderly Conduct Restraining Order statute and included language from this decision in its notes.[341] The only change the legislature made to the statute was a procedural change to subsection (4).[342] Subsection (4) of the 1995 supplement limited the effectiveness of the temporary restraining order to thirty days.[343]

The legislature also added subsection 11 to the 1995 supplement.[344] This subsection provided that no fees may be charged to petitioner in any proceedings seeking relief due to domestic violence.[345]

The legislative notes included in this supplement represent the legislature's adherence to the North Dakota Supreme Court's interpretation and application of the 1993 statute in *Svedberg*:

> Taunts, threats, including a threat to kill, and the public display of snow effigies which were constructed to harass victim, when delivered to a 14-year-old, were sufficient when taken as a whole to constitute fighting words, and were therefore unprotected by the First Amendment. . . . To determine what constitutes fighting words, a court must consider both the content and the context of the expression, including the age of the participants.[346]

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338. *Id.* (finding the majority's treatment of the Disorderly Conduct Restraining Order statute "distressing").

339. *Id.*

340. *Id.* (citation omitted).

341. N.D. CENT. CODE § 12.1-31.2-01 (Supp. 1995).

342. *Id.* § 12.1-31.2-01(4). This subsection, in the 1993 statute, stated that the effective time of a temporary restraining order was until a hearing was held on the issuance of a restraining order under subsection 5.

343. *Id.*

344. *Id.* § 12.1-31.2-01(11) (stating that "[f]ees for filing and service of process may not be charge to the petitioner in any proceeding seeking relief due to domestic violence under this chapter").

345. *Id.*

346. *Id.* (citations omitted).

III. ANALYSIS

On the surface, it is understandable why the North Dakota Supreme Court felt compelled to render "relief" in this situation. Both the school administrators and the community (including Stamness' parents) failed to recognize and remedy the pain one child was imposing on another.[347] The court did not, however, serve justice with its decision. The court provided no standards for lower courts to evaluate the application of this "remedy" for future bullying cases. An analysis of the court's fighting words approach exposes the limitless boundaries the court has created for the future application of the Disorderly Conduct Restraining Order statute to children. This section of the Note further explores this situation as resolved under public school law, thereby suggesting the appropriate forum for most bully-victim resolutions.

A. Inappropriate Forum for Remedy

Although the *Svedberg* majority and concurrence had proper intentions, its faulty and ambiguous fighting words reasoning elicited an inadequate result. The North Dakota Supreme Court majority identified the relevant U.S. Supreme Court precedent in its general fighting words discussion.[348] It reviewed the applicable rules and noted *R.A.V.*'s recognition of the continued vitality of the doctrine.[349] In fact, the majority correctly defined the current fighting words test used to determine what expression is protected and what is not: "To determine if an expression constitutes fighting words, we must ask whether the expression, if delivered to a reasonable and prudent person . . . , would cause the addressee immediately to breach the peace."[350] Despite this correct identification, the majority simply does not apply the law properly to the facts of the case.

The majority's fighting words analysis hinged on the context of the boy's expression. In other words, the majority focused on the ages and the circumstances surrounding the encounters to justify its holding.[351] The majority used a great deal of ink to defend its reliance on the "context" of the speech (the age of the participants). The consid-

347. Svedberg v. Stamness, 525 N.W.2d 678, 685 (N.D. 1994) (noting that even though the victim's parents approached the school board for assistance in resolving the matter, they were denied such relief).

348. *Id.* at 682-84.

349. *Id.*

350. *Id.* at 683 (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

351. *Id.* at 683-84 (discussing case law supporting the majority's position). The majority emphasized that the "only workable definition [of fighting words] must necessarily be contextual." *Id.* at 683.

eration of the participants' ages was not erroneous. In fact, the North Dakota Supreme Court previously advocated looking into the context of the situation when making a fighting words determination in its 1991 *Schoppert* decision.[352] The concurring and dissenting opinions in *Svedberg* also supported the consideration of the context of the speech.[353] However, despite this undisputed look into the context of the speech, the majority utterly failed to apply the context of the boy's expression to the fighting words test.[354] Thus, after the majority resolved that it would consider the ages of Svedberg and Stamness in the fighting words determination, it concluded, without applying the test, that Stamness' expression constituted fighting words.[355] The limited analysis the majority did perform was in the concluding sentences of its opinion.[356] The majority determined that Stamness' expression, described as "taunts, threats . . . , and public display of snow effigies, . . . as a whole constituted fighting words."[357] The majority failed to apply the fighting words test, focusing exclusively on the content of the expression, rather than on the response of the addressee.[358]

In order to determine whether the taunts, threats, and snowmen were fighting words, the majority needed to analyze the following question: Would Stamness' expression, when delivered to a reasonable thirteen-year-old individual, cause this individual immediately to breach the peace?[359] The articulation of the proper question reveals why the majority avoided posing it: A reasonable, thirteen-year-old boy would *not* be likely to fight back in response to the taunts of a seventeen-year-old boy, especially if that thirteen-year-old boy had been the target of such taunts for years.[360] Although the fighting

352. City of Bismark v. Schoppert, 469 N.W.2d 808, 812 (N.D. 1991).

353. *Svedberg*, 525 N.W.2d at 684-87.

354. *Id.* at 684 (holding that Stamness' expression constituted fighting words). Although the majority determined that the correct test evaluates the reaction of a reasonable thirteen-year-old, it failed to apply it.

355. *Id.* at 683. The majority based its fighting words determination on the fact that the expression at issue was between children, not that the expression was likely to cause a violent response. *Id.*

356. *Id.*

357. *Id.*

358. In fact, North Dakota had previously recognized the importance of looking at the reaction of the addressee in its *Schoppert* decision. *See* City of Bismark v. Schoppert, 469 N.W.2d 808, 813 (N.D. 1991). In *Schoppert*, the court determined the defendant's "words were not a clear invitation to fight," thus failing the fighting words test. *Id.*; *see also* Feiner v. New York, 340 U.S. 315 (1951) (upholding a conviction based on the audience's reaction to a speech, not the words spoken alone).

359. *Svedberg*, 525 N.W.2d at 683. This question was constructed from the majority's identification of the relevant test.

360. *See* Marano, *supra* note 223, at 54 (discussing the unlikelihood of a victim child of bullying to respond physically to his bully aggressor).

words test fails to consider the unlikelihood of such a response, the majority should have, at the very least, articulated a rationale for still classifying this expression as fighting words.[361]

By refusing to address the obvious failure of the test or give other support for its conclusion, the majority leaves future courts with a conclusory, per se test. This approach focuses on the ages and circumstances of the participants and permits the court to presume fighting words solely based on the fact that the court is dealing with expression between children. This gives the lower courts little direction since it appears that these courts could render most "teasing" dialogue between children as fighting words. Once these courts find that a child's words are not protected expression (that it constitutes fighting words), this "teasing" expression will undoubtedly fall within the definition of "disorderly conduct" under the current stalking law.[362] The majority's open-ended approach has dire future implications on how North Dakota will handle confrontational child dialogue, as further addressed in Part IV.

The concurrence in *Svedberg* agreed with the majority that Stamness' expression should not receive immunity, although it implicitly recognized the shortcomings of the fighting words approach by taking an alternative argument. The concurring justices chose to "hang their hat" on Stamness' threat to Svedberg as falling outside the First Amendment protections. As a general principle, threats of violence should not be protected, but as the dissenting justice points out, it is also important to look at the threat in the context of the situation.[363] Although there should be no excuse for one child threatening the life of another, the context of the threat does not support bootstrapping all of Stamness' expression to one careless comment.[364] If the concurrence, and majority, were so concerned with the threat, it could have,

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361. For example the majority could have asserted a lower constitutional protection for Stamness' expression based on Stamness' status as a child. *See* MOSHMAN, *supra* note 124, at 6 (recognizing that children possess modified constitutional rights). Furthermore, some scholars contend that the fighting words standard as a whole should rely less on the response of the addressee and take into account the situation of the victims. *See, e.g.*, GREENAWALT, *supra* note 10, at 53 ("[The] inquiry should not concentrate on the perceived capacity of a particular victim to respond physically. The test should be whether remarks of that sort in that context would cause many listeners to respond forcibly."). *Id.*

362. N.D. CENT. CODE § 12.1-31.2-01 (Supp. 1995). The statute covers "intrusive or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another person." *Id.* It is therefore likely that unprotected teasing expression would be disorderly conduct under North Dakota's stalking statute.

363. *Svedberg*, 525 N.W.2d at 687 (Levine, J., dissenting).

364. *Id.* The dissenting justice had "difficulty taking serious the utterance of an insensitive, teenage clod." *Id.*

as the dissent suggested, limited the restraining order to further threats of violence.[365]

Besides pointing to some of the shortcomings in the approaches of the majority and concurrence, the dissenting justice in *Svedberg* correctly identified where this case belonged: back in the community and out of the courts.[366] The dissenting justice scolded the school administrators and parents in this situation for failing to resolve this situation in their community. Unlike the majority or concurrence, the dissenting justice looked beyond the individual case to the implications of future parents and children resolving these situations through the law.

In addition to the inappropriateness of the court's role in curtailing a verbal bullying situation, the utilization of the Disorderly Conduct Restraining Order statute, which supplements the anti-stalking statute,[367] as a vehicle into court may threaten to stretch the statute's contours to unconstitutional boundaries.[368] The events that prompted states to enact anti-stalking legislation suggest that such laws were intended to protect women who were being watched, followed, harassed, and abused by estranged husbands, boyfriends, and even strangers.[369] It is certainly possible that a child may engage in "stalking" behavior and the stalking law could cover those situations where schools and parents are unable to control adequately intrusive activity that threatens the safety of another child. However, it is inappropriate to use stalking laws to control verbal bullying situations between children because, unlike most stalking victims whose only protection

365. *Id.*

366. *Id.* Justice Levine, the dissenting justice, also expressed concern with the application of this statute in the stalking context as applied to bullying situations. Her concern goes back to the majority's limitless application of the statute and its failure to put any restraints on lower courts in future application to the bullying context. *Id.*

367. *See supra* notes 113-15 and accompanying text (discussing the legislative history indicating the supplemental nature of the Disorderly Conduct Restraining Order statute to the anti-stalking statute).

368. The dissent in *Svedberg* attacked the majority's broad construction of "disorderly conduct" within the meaning of the supplemental anti-stalking law. *Svedberg*, 525 N.W.2d at 687 (Levine, J., dissenting). The dissent noted the majority's construction "turn[ed] [the Disorderly Conduct Restraining Order statute] into an overbroad, unconstitutional statute . . . as applied." *Id.*

369. *See supra* note 116. California, the first state to enact an anti-stalking law, passed its legislation in response to the murders of women who were stalked by men from previous relationships or strangers. *See* Sneirson, *supra* note 116, at 652. The dissent in *Svedberg* noted that the Disorderly Conduct Restraining Order statute used to prohibit Svedberg's expression was "passed in response to the growing community awareness of domestic violence and the need to control stalking." *Svedberg*, 525 N.W.2d at 685 (citation omitted). Furthermore, the dissent believed that this statute was designed to supplement the anti-stalking law and restrain "frequently employed tactics of intimidation by stalking, *engaged in by expartners of broken relationships*." *Id.* (emphasis added).

is under the law, the victimized child can seek shelter in more effective fora than the courts: the school and home environment.

B. Proper Forum Advocated

Stamness' expression could have been prohibited more effectively within the confines of the school environment. Had the North Dakota Supreme Court forced the resolution back to the community level, the school system could have more appropriately and effectively prohibited Stamness' expression. Under public school law precedent, Stamness' expression would have been deemed a disruption to the "operation of the school."[370] This disruption was obvious in Svedberg's physical and emotional condition as a result of this teasing and it likely impacted the school environment for other children (either those who witnessed or those who participated in the teasing).

Furthermore, even under Moshman's theory, Stamness was probably less rational than an adult and generally unable to conceptualize moral issues.[371] Moshman's evaluation of studies on children's psychological development indicates that many teenagers reach an adult level of rational thinking and as a result should have similar First Amendment protections due to the teen's ability to comprehend the effects of speech and expression.[372] However, even though Stamness had reached his teen years at the time of this incident, Moshman would certainly agree that Stamness' behavior and total disregard for another student's obvious pain and embarrassment is evidence that Stamness was not rationalizing as an adult. Moshman would also conclude that disruptive speech in school should be curtailed to avoid harm to other children.[373] Thus, even the theory Moshman advocates points to active school discipline to curtail Stamness' disruptive expression directed at Svedberg due to the harm it caused Svedberg and

370. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 (1969). School authorities could have also controlled Stamness' "off-school" expression since it had a detrimental impact on Svedberg's well-being. *See supra* notes 214-16 and accompanying text (discussing the latitude schools have in punishing children for activities occurring off school premises). Even Moshman would recognize the need for discipline and control in the case note situation. *See supra* notes 182-83, 199 and accompanying text. The bully's maturity level was clearly less than expected for his age.

371. *See supra* notes 193-99 and accompanying text (discussing Moshman's theory that children show signs of emerging rationality and may, by early teenage years, have the same ability to rationalize as an adult). According to Moshman, a child's ability to rationalize provides justification for full First Amendment protections. MOSHMAN, *supra* note 124, at 90-91.

372. MOSHMAN, *supra* note 124, at 90-91. Moshman notes that courts often rely on the myth that children are "inherently irrational" to justify restriction on their liberty. *Id.* at 91.

373. *See id.* at 89-91.

the school environment and the participant's inability to rationalize as an adult.

It may be argued that because the school could properly curtail Stamness' expression under public school law precedent, there is no harm when a court steps into the school's role and accomplishes the "same" result through legal means instead of school discipline. This argument is necessarily premised on the idea that the court could achieve the same, or even similar, results through a restraining order as the schools could through discipline and treatment. This simply is not the case. The judicial system is neither equipped to continually monitor these situations between children nor is it capable of moving beyond the quick-fix remedy to treat the problem. Thus, such an argument that equalizes the roles of the schools and courts in bullying situations fails due to the unequal capabilities to truly remedy the problem.

In addition to the unequal remedies, the school's role in disciplining children in public schools was explicitly outlined in *Tinker* as not only a right, but a duty to guarantee the proper operation of the educational process.[374] Thus, the court's assumption of that role deprives a school of its essential function of molding the discipline to fit the circumstances of the incident and the children involved.

Not only could the schools accomplish the same result as the court did, the overall result would have been more effective, rendering both Svedberg and Stamness a more peaceful resolution. The court quite clearly cannot do what a school, parents, and a community can do, that is, address the problems at the root, going beyond mere discipline.[375] Despite the courts' inability to fully address these problems, this author recognizes that the *Svedberg* court's artificial means may have been the only solution in this case where the other avenues for relief failed.[376] Although the record is not clear on the exact steps Svedberg's parents took to remedy the bullying, there is evidence that the parents talked to the school board in attempts to stop this behav-

374. *Tinker*, 393 U.S. at 507. The Court emphasized the authority of school officials to control and regulate the operations of the school. *Id.*

375. *See* Marano, *supra* note 223, at 53, 55, 57 (suggesting a more comprehensive approach to the psychological issues).

376. Although the author disagrees with the court's fighting words analysis and the general inappropriateness of using the stalking law to remedy a bully situation, she acknowledges the improbability that this particular community (particularly Stamness' parents) would have rectified the situation absent the restraining order. The school administrators, however, may have been more effective in curtailing this behavior if the court had ordered it to address the matter.

ior.[377] Therefore, the court should have limited the statute's applicability to cases where the victim and his or her parents have exhausted their remedies in the school and community. Although the court in *Svedberg* most certainly had good intentions, its open-ended opinion raises concerns about the future impact it may have on how North Dakota, and possibly other states, will handle childhood confrontations.

IV. IMPACT

As mentioned, what may be even more troubling than the majority's fighting words analysis was its complete failure to limit the future application of the statute. This section previews the potential impact this decision may have on the future resolution of childhood disputes. Before the impact of North Dakota's approach is explored, it is necessary to recognize the tragic consequences that can result from a bullying situation.

A. Bullying Behavior Is Not "Child's Play": Tragic Consequences

What happens to a child who is tormented, teased, ridiculed, and basically socially ostracized by his peers? Some children may only be picked on once or twice a year or even once or twice in their childhood. These children are usually able to cope with the few incidents because they learn to handle confrontational situations and typically have good self-images to combat the spiral of intimidation.

Then there are the other children, the eight or nine percent of all children teased, who are the constant target for bullying and aggressive behavior.[378] What happens to them? Hopefully, these children do not sink into their own despair like eighth-grader Curtis Taylor

377. Svedberg v. Stamness, 525 N.W.2d 678, 685 (N.D. 1994) (Levine, J., dissenting) (noting that this case was "a sad tale of parents who failed to parent and school administrators who failed to administer"). The dissent noted that Svedberg's parents talked to school board members about the name calling "but to no avail." *Id.* Neither the majority nor the concurring opinion mentioned this failure of the school to curb this behavior. *Id.* at 678-85. A later report indicated that prior to turning to the stalking law, the Svedberg's had filed charges against some of the bullies harassing their son. Lister, *supra* note 220, at 119. This report quotes Darlene Svedberg, the victim's mother, regarding the measures they took to stop the bullying behavior by several different boys: "'Although we asked the school to put an end to the bullying and we reported the bicycle thefts to the police, those boys were never really disciplined.'" *Id.* It is further reported that Mrs. Svedberg believed that the "community encourage[d] teasing." *Id.* The superintendent of this community's public schools said that he took "appropriate action in response to the Svedbergs' complaints." *Id.*

378. Marano, *supra* note 223, at 54. Most of these children who are constant targets are between the ages of 8 and 16. *Id.*

did.[379] In 1993, after years of tormenting physical and verbal aggression from classmates, Curtis took his own life in his family home.[380] The day of his suicide was reported to be an especially harassing day where boys poured milk down Curtis' shirt in front of his classmates.[381]

Several months later, the nation was shocked again by the suicide of fifteen-year-old Brian Head in Georgia.[382] Brian was teased for years and suffered deep depression.[383] One day at school, Brian walked to the middle of his classroom, screamed that he could not take it anymore, and shot himself in the head before his horrified classmates.[384]

The seriousness of bullying behavior is illustrated in these fatal consequences that strike communities every year. In fact, it is often incidents like these that wake up communities and schools to implement more effective approaches to control these situations.[385] Unfortunately, for Curtis and Brian, this help came too late. These events illustrate the seriousness of this behavior and the real need for help for both the victim and his aggressor.

B. A Court-Ordered Solution To Control Bullying Fails the Children Involved

A trend toward a law-based remedy to stop bullying would only circumvent the problems that fester below the surface of aggressive and submissive behavior. The court's decision in *Svedberg* may have rendered a remedy for one child, but its standardless approach leaves North Dakota on the edge of a tempting trend. By not defining the boundaries of its decision, the court may have invited parents and schools to allow the law to take over the control of their children. The court should have limited the application of this remedy to cases where there is a complete failure in the homes, school, and community to curtail effectively the bullying problem. The appeal of the restraining order is its seemingly "tough" approach. After all, a $1,000

379. *Id.* at 51.

380. *Id.* Marano describes the abuse Curtis experienced at his middle school in Burlington, Iowa: "For three years other boys had been tripping him . . ., knocking things out of his hands. . . . [and had] taken his head . . . and banged it into a locker. . . . His bicycle was vandalized twice. Kids even kicked the cast that covered his broken ankle." *Id.*

381. *Id.* Immediately after that incident, Curtis went to see a school counselor and reportedly "blamed himself for the other kids not liking him." *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *See* Lewis, *supra* note 277 (describing one school's reaction to the suicide of Brian Head).

fine and up to one year in jail is a much tougher sentence for "breaking the rules" than a suspension or no recess.[386]

In addition to the court's role, the North Dakota legislature's quick action to approve of such a remedy is evident by its adoption of some of the majority's language in the legislative notes following an amendment to the statute.[387] This act by the legislature puts the state's stamp of approval on such actions by parents, letting them know that the state will assume the role of a child's disciplinary figure. In other words, by adopting the majority's language from the opinion, the legislature is implicitly recognizing its Disorderly Conduct Restraining Order statute as an appropriate solution to remedy all bullying situations, regardless of the efforts of the schools and parents to stop the behavior.

The fundamental problem with using the law to stop a bullying situation is that it only deals with the remedy, not the cure. Both the bully and the victim need to get beyond the underlying issues that result in the circle of aggressive or submissive behavior.

For example, the bullying child needs to learn to deal with his aggression.[388] He or she also needs to be taught to "feel empathy toward the victim."[389] If not treated, it will only be a matter of time before the bully finds a new target or a new source for his aggression. These children can grow up into aggressive adults—which can lead to crime and domestic violence.[390] Professor Olweus has documented school bullies' tendencies towards crime and violence as adults.[391] His studies showed that sixty percent of boys who displayed bullying behavior in the sixth through ninth grades had at least one conviction by their twenty-fourth birthday.[392] Even more disturbing, over one-third of the bullies had three or more convictions by this age.[393] Professor Olweus concluded that "as young adults, the former school bullies had a fourfold increase in the level of relatively serious, recidivist criminal-

386. N.D. CENT. CODE § 12.1-31.2-01(7)(b) (Supp. 1995) (delineating the penalties for violating the restraining order).

387. *Id.*

388. *See* Marano, *supra* note 223, at 82.

389. Douglas, *supra* note 235, at 6.

390. *See* Marano, *supra* note 223, at 82; *see also* HAZLER, *supra* note 1, at 34 ("Those who remain chronic bullies during school age are much more likely to have a variety of violence and crime-related problems as adults . . . .").

391. OLWEUS, *supra* note 1, at 36.

392. *Id.*

393. *Id.* Professor Olweus further noted that only ten percent of the boys who were neither characterized as bullies or victims in grades six through nine had three or more convictions by age twenty-four. *Id.* Former victims were described to have average or below-average level of criminality by their mid-twenties. *Id.*

ity."[394] Thus, those children who do not learn how to deal with their aggression are likely to have troubled adult lives.

Similarly, the victims also need to learn skills to improve their self-image and to gain control over their environment in order to grow into healthy adults.[395] Most severely teased and tortured children suffer from depression and have dangerously low levels of self-esteem.[396] Not only does the victimized child need counseling, but he also needs to develop the self-confidence to face future confrontational situations.[397] The law cannot be there for the child in every situation, but self-esteem will.

In fact, the real tragedy in the *Svedberg* case further illustrates the law's inability to truly remedy the situation. After the court awarded the restraining order, the Svedberg family felt forced to move from their town based on the negative reaction both the parents and their child received from their community.[398] Such a result is a sad commentary on the lack of support the school and community gave this family to correct abusive behavior between children.

CONCLUSION

There is no easy answer as to how the case at issue should have been decided. The court was not wrong for providing a remedy where the school and community allegedly failed in its responsibility to protect its children. Beyond the majority's failure to apply correctly the fighting words doctrine, the court's error may have really been in its shortsightedness to the potential "trend" that may result from its open-ended decision. The Disorderly Conduct Restraining Order statute and the other anti-stalking law should only be applied to those situations where the parents, school, and community have failed to address or stop persistent harassment of specific children. Because the North Dakota Supreme Court and the legislature failed to limit

394. *Id.*

395. Former bullied victims may feel the pain of their victimization into adulthood. *See* HAZLER, *supra* note 1, at xii-xvii (sharing the story of Tom Brown, titled *You Never Really Get Over It*); Douglas, *supra* note 235, at 1, 6 (noting the pain and anger a woman in her thirties carries with her to this day from severe teasing from her school years).

396. *See* Marano, *supra* note 223, at 82.

397. *See* Douglas, *supra* note 235, at 6 (noting that "[t]he victim needs to be taught how to practice assertive behavior: how to use posture, eye contact, voice and other techniques to convey strength").

398. Lister, *supra* note 220, at 116, 138 (noting that the family "won the battle but lost the war" when the Svedbergs felt forced to move to a different town even after the restraining order was upheld by the supreme court); *see 20/20*, *supra* note 274.

the statute's applicability, it is vital for parents, schools, and communities to resist any temptation to use the law as its first source of relief.

Such an old-fashioned problem deserves the old-fashioned remedy: Society must control this behavior in the homes, schools, and communities where it can be cured. Parents and the schools should remain the guardians of children to prevent the bullying and aggressive conduct. Although aggressive expression is particularly tough to monitor and control based on its often secret and nonphysical nature, it is clearly better controlled in the schools and homes rather than in the courts. The *Svedberg v. Stamness* case demonstrates the difficulty, if not impossibility, to construct a workable and effective fighting words approach to bullying situations. Therefore, keeping bullying cases in the school where they belong is essential to effective resolutions of these problems. It is the only way to ensure that both the victim and his or her bully get the psychological help needed to untangle the web of inner doubt and destruction.

There is an issue of bullying that goes beyond the words, the wounds, and the pain involved in this childhood phenomenon. Professor Olweus labels this issue as involving "fundamental democratic principles":

> Every individual should have the right to be spared oppression and repeated, intentional humiliation, in school and society at large. No student should have to be afraid of going to school for fear of being harassed or degraded, and no parent should need to worry about such things happening to his or her child![399]

As guarantors of such rights, schools and communities must work together to grant every child in their care that right to learn and grow in a safe environment.

Colleen Creamer Fielkow

399. OLWEUS, *supra* note 1, at 48.